TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1947

No. 446

PAUL AHRENS, ET AL., PETITIONERS,

vs.

TOM C. CLARK, ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

FILED NOVEMBER 19, 1947.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DEC. 11, 1947.

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[fol. 1]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Habeas Corpus No. 3243

PAUL AHRENS, MAX ARMBRUSTER, WILLI BACKOFEN, PAUL BANTZ, Maria Bertelmann, Else Brink, Walter Brink, Karl J. Boehm Max Blank, Otto Braunger, Albert Brueckner, Alrich Cappelmann, Ernst E. Christoph, Hans Diebel, Hans Doelle, Johann R. Enders, Walter Engelbert, Wilhelm Engelbert, Anna Faller, Xaver Faller, Richard Felis, Walter Feltz, John C. Fitting, Kurt Fries, Luise Fritsch, Anna Fuhr, Eberhard Fuhr, Karl Fuhr, Rudolf Funk, Paul Geis, Adolpf Goelzer, Otto Grimm, Georg Grytzyk, Rudolf Gudert, Wilhelm Hack, Helene Hackenberg, Rudolf Hackenberg, Robert Hartmann, Albert Haug, Erna Haupt, Heinz Heinzen, Werner Hofling, Hedwig Hohmann, Martin Hohmann, Paul Hohmann, Hermann Hoehn, Kurt Holz, Andreas Heinrich Jans, Hans Juhl, Johannes L. Jung, Wolfgang T. Jung, Konrad Jungklaus, Wilhelm Kaecher, Joseph Kaiser, Marie Kerling, Julius Kessler, Hans Kippenberg, August Klapproth, Josef Klein, George B. Knaepper, Paul Knauer, Wilhelm Knaup, Fritz Koehler, Hermann [fol. 2] Koetter, Maria Th. Kohler, Mathias Kohler, Hans L. Kohpeiss, Albert Kolb, Bruno Koop, Jr., Bruno Koop, Sr., Alfred Krakau, Heinz Krebs, Arthur Kuehn, Joseph Kuehn, Wilhelm Lachnicht, Ernst Lack, Hans Laudage, Alois Lieb, Gotthilf Ludwig, Wilhelm Mank, Elisabeth Meuser, Waldemar Meuser, Gertrud Neubacher, Otto Neubacher, Georg Neuper, Karl Nuernberger, John Oldin, Willie Orths, Martin Ortner, Adolf Pasquay, Hans Poehner, Max Rapp, Rosine Rapp, Erich Raubenheimer, Hartwig Reese, Henry Reese, Kasper Rehle, Maximilian Reichel, Werner Reimann, Ludwig Resch, Georg Riemenschneider, Hermann Roehm, Theodore Kurt Roehner, Anna Rubischon, Edwin Rubischon, Anton Rueble, Gerhard Schacht, Peter Schau, Wilhelm Schaumann, Karl Schelkshorn, Martin Schluckwerder, Hans J. Schmidt, Kurt Schmidt, Bernhard Schmolke, Hans Schnoor, Franz Schrader, Albert Schroeder, Siegfried Schulte, Karl Schweitzer, Kurt Schweitzer, Ernst Schwenk, Hermann

Schwinn, Herbert C. Seyfferth, Gerhard Sprenger, Agnes Stephan, Meta Stoehr, Johann Stoll, Walter Sykora, Karl [fol. 3] Ueberscheer, Antonie Uhlig, Hugo Unrecht, Gregor Volkheimer, Otto Wagner, Hans E. Weik, Hans Wichers, Johann Wichers, Selma Wichers, Maria Willumeit, Paul Zitzmann, Petitioners,

(Of Ellis Island, New York Harbor)

vs.

Tom C. Clark, Attorney General of the United States Department of Justice, Washington, D. C., Respondent

Petition for Writ of Habeas Corpus—Fied July 17, 1947

The petitioners referred to above are now confined at Ellis Island, New York Harbor, and are subject to deportation to Germany. Due to the fact that they are held to be persons who adhered to the Nazi form of government during the war, petitioners say unto the Court that at no time have they committed any crimes nor can it be shown that they were guilty of anything tending to interfere with the war effort or to undermine the morale of the armed forces. Petitioners say unto the Court that they are in imminent danger of removal and are subject to the custody and control of Tom C. Clark, Attorney General of the United States.

Petitioners say that while they were accorded a perfunctory hearing, it did not conform to due process of law in that the Board appointed was not fair and impartial but had already prejudged the merits of the case. Petitioners say that they were not given the right to offer testimony in their own behalf, nor were they offered the opportunity to confront the accusers appearing against them, nor were they permitted to cross-examine the witnesses, or given the right of assistance of counsel. Petitioners say that this is a [fol. 4] fundamental right and inasmuch as their freedom is at stake the constitutional question involved in this case is serious and important.

Petitioners say further that there is no legal basis upon which the Attorney General can now remove these persons to Germany inasmuch as the war is practically at an end and the President of the United States has virtually surrendered all of his war powers and without the full exercise of the war powers permitted during the existence of an

emergency, these petitioners could not be removed unless they were removed under the ordinary immigration and deportation laws.

Petitioners say further that if they are sent to Germany they will be sent to the Russian zone of occupation, which will result in servitude and perhaps death.

Petitioners say further that there is no valid government of Germany to receive these persons in accordance with ordinary law and usage inasmuch as the control of Germany is in the hands of three powers and would have the force and effect of turning these persons over to the Communistic rule of Rusia. Petitioners say unto the Court that they have consistently and at all times opposed the doctrine of Communism and have fought it constantly.

It has been understood and agreed that unless the petitioners were definitely shown to have been active members of the Nazi party or actively adhering to the Nazi form of government they would not be removed from our shores, and petitioners say unto the Court that they can show satisfactorily that they have not been active members of the Nazi party or adhered to the Nazi form of government.

Wherefore, the premises considered, petitioners pray:

1. That writ of habeas corpus issue from this Court directed to the respondent, Tom C. Clark, Attorney General of the United States, requiring him to show cause why the [fol. 5] petitioners should not be released from custody.

2. And for such other and further relief as the circumstances of the case may require and to this Court may seem just and proper.

James J. Laughlin, Attorney for Petitioners.

Subscribed and sworn to before me this 17th day of July, 1947. Flora Hock, Notary Public, D. C.

James J. Laughlin, National Press Building, Counsel for Petitioners.

[fol. 6] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

[Title omitted]

AMENDMENT TO PETITION FOR WRIT OF HABEAS CORPUS—Filed July 23, 1947

Now come the petitioners and amend their petition to state the following:

A considerable number of the petitioners herein are not in fact alien enemies, as defined in the Act of July 6, 1798, Title 50, Section 21, United States Code, in that their citizenship was taken from them without due process of law and as a result of war hysteria. Petitioners ask the Court for an opportunity to present evidence on this aspect of the case.

When the orders of removal were issued there was no longer a war and the petitioners were no longer alien enemies, as defined in the Act of July 6, 1798. A study of the Congressional debates which preceded the passage of this Act in 1798 will establish beyond question that in using the words "declared war" and "hostile nation or government", the legislators had in mind "war in fact" or "actual hostilities" and not a technical "state of war".

When this Act was written in the spring of 1798, two grave problems faced the legislators. One was the tremendous power being asserted over all Europe by the French, a power which even then threatened to spread [fol. 7] across the Atlantic and engulf the United States (see *Bas* vs. *Tingy*, 1800, 4 Dallas 37, at 40). The other, was the serious internal struggle between the States and the Federal Government for the control of migration of aliens. As Albert Gallatin pointed out during these very debates

> "* * * by turning to the 9th section of the Constitution, it is found that the migration of such persons (aliens) as any of the States shall think proper to admit, shall not be prohibited by Congress prior to the year 1808."

In view of the proclamation issued to the people of Germany and in view of the official declaration of the Department of State declaring the complete demise of the German government, the cessation of actual hostilities and the assumption of supreme authority by the Allied Powers as to

every function of the former German government, it is respectfully submitted that not later than October 29, 1945, the political branch of the United States Government had ended the war with Germany so far as the Alien Enemy Act of 1798 is concerned.

When the orders of removal of the petitioners were issued there was neither any "hostile nation or government" of which they were natives or citizens, nor any such entity against which the United States could any longer be at war within the purport of the Alien Enemy Act.

In this connection, particular emphasis is placed on the Presidential Proclamation of May 8, 1945, stating that there had been won "from Germany a final and unconditional surrender." In other words, the President has made "public proclamation of the event," (see Section 21, Title 50, USCA), that so far as Germany is concerned, no further act of war or peace can be done. The capitulation is final. When this extraordinary event was followed by the official proclamation of the United States Department of State that the four Powers were assuming all functions of the extinct German government, the political branch of the Government [fol. 8] has most certainly declared an end to the war as provided in the Alien Enemy Act.

This aspect of political action is emphasized because it has been the practice of the courts in cases dealing with the Alien Enemy Act to avoid the issue of war termination by stating that this is a political question.

For example, in *United States ex rel. Hack* vs. *Clark* (C. C. A. 7th 1947), 159 F. (2d) 552, it is stated:

> "Whether the country from whence he came is still at war with the United States or is still in existence as a sovereign power is not for any court to say; that is a political question to be answered only by those branches of our Government charged with the responsibility of political decisions, namely, the executive and legislative branches. Jones vs. United States, 137 U. S. 202, 11 S. Ct. 80, 34 L. Ed. 691; Citizens Protective League vs. Clark."

There is no disagreement with the principle asserted in this line of decisions. On the other hand, where the political branch of the Government has taken the steps proclaiming the final defeat, the complete demise and the substitution of its own power in the place of the hostile nation or govern-

ment, that action compels judicial recognition in the application of a statute such as the Alien Enemy Act.

We say in view of this that there is no lawful authority to remove these persons to Germany inasmuch as there is no existing government of Germany.

Habeas corpus is a proper remedy for raising the question whether these petitioners were alien enemies when the orders of removal were issued. This we believe is settled beyond question in *United States* vs. *Uhl*, 137 F. (2d) 898, and *United States ex rel. Hack* vs. *Clark*, 159 F. (2d) 552.

Wherefore, petitioners pray:

1. That rule to show cause issue from this Court directed to the respondent requiring him to show cause why the writ of habeas corpus should not issue.

[fol. 9] 2. And for such other and further relief as the circumstances of the case may require and to this Court may seem just and proper.

James J. Laughlin, National Press Building, Counsel for Petitioners.

Let this amendment be filed.

Bolitha J. Laws, Chief Justice.

[fol. 10] DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

[Title omitted]

RESPONDENT'S MOTION TO DISMISS PETITION—Filed July 21, 1947

Comes now the Respondent, Tom C. Clark, Attorney General of the United States, by his undersigned attorneys, and moves the Court as follows:

1. To issue its order dismissing the petition herein as to all Petitioners.

2. To rule, as to the petitioners listed in "Exhibit A" appended to this motion, all of whom were parties to the case of *Herman Agne et al.* v. *Tom C. Clark, Attorney General*, Habeas Corpus No. 3132 in this Court, (a) that the present petition is merely a renewal of the application for a writ of habeas corpus which was refused by this Court

and the United States Court of Appeals for the District of Columbia in that case, (b) that no sufficient ground for reconsideration of such application appears and (c) that, therefore, the dismissal of the petition as to such petitioners is not a decision refusing a writ of habeas corpus within the meaning of Par. 1 of Rule 45 of the Rules of the Supreme Court of the United States, and Rule 29(a) of the Rules of the United States Court of Appeals for the District of Columbia so as to prevent execution of the removal orders complained of by such petitioners herein.

The grounds for this motion are:

[fol. 11] (1) This Court does not have jurisdiction to issue a writ of habeas corpus with respect to any of the petitioners, all of whom are and, by the petition, are alleged to be, without the territorial confines of the District of Columbia.

(2) That all matters sought to be raised by the petitioners have been decided adversely to them in earlier actions and proceedings in this Court and in the United States Court of Appeals for the District of Columbia.

(3) That all allegations of the petition herein were in fact and in substance made in the petition in the case of *Herman Agne et al.* v. *Tom C. Clark, Attorney General, supra,* which proceedings were dismissed by this Court and by the United States Court of Appeals for the District of Columbia.

Respectfully submitted, Peyton Ford, Assistant Attorney General; George Morris Fay, United States Attorney; Herbert A. Bergson, Special Assistant to the Attorney General; Enoch E. Ellison, Special Assistant to the Attorney General, Attorneys for Respondent.

[fol. 12] DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

[Title omitted]

ORDER DISMISSING PETITION FOR WRIT OF HABEAS CORPUS AND DENYING STAY—July 23, 1947

This cause comes on to be heard on the Amended Petition and Petition for Writ of Habeas Corpus, herein, on Respondent's Motion to Dismiss the Petition and to rule as to

certain Petitioners that the dismissal of the petition is not a decision refusing a writ of habeas corpus within the meaning of Par. 1 of Rule 45 of the Rules of the Supreme Court of the United States and Rule 29(a) of the Rules of the United States Court of Appeals for the District of Columbia, and on Petitioners' application for a stay based upon said rules and, after oral argument, the Court being fully advised in the matter, and it not appearing that there has been any material change in the pertinent facts or circumstances relating to the petitioners since the petition for a writ of habeas corpus was filed in this Court in the case of *Herman Agne et al.* v. *Tom C. Clark, Attorney General,* Habeas Corpus No. 3132, and it appearing that, on December 10, 1946, this Court entered its order dismissing the petition in that case, that the petitioners in that case promptly noted an appeal from such order to the United States Court of Appeals for the District of Columbia, that on February 24, 1947, that Court entered its order dismissing the appeal and that certain of the petitioners herein were also petitioners in the said case of *Herman Agne et al.* v. *Tom C. Clark, Attorney General,* Habeas Corpus No. 3132, as follows:

> Paul Ahrens, George Willi Backofen, Paul Bante, Max Blank, Karl J. Boehm, Otto Braunger, Else Brinck, Walter Brinck, Albert Brueckner, Ernst E. Christoph, Hans Diebel, Hans Doelle, Johann R. Enders, Walter Engelbert, Wilhelm Engelbert, Anna Faller, Xavier Faller, John C. Fitting, Kurt Fries, Luise Fritsch, Anna Fuhr, Karl Fuhr, Rudolph Funk, Adolf Goelzer, Georg Grytzyk, Helene Hackenberg, Robert Hartmann, [fol. 13] Albert Haug, Erna Haupt, Hermann Hoehn, Hedwig Hohmann, Martin Hohmann, Paul Hohmann, Kurt Holz, Emma Weik Jans, Johannes L. Jung, Konrad Jungklaus, Joseph Kaiser, Maria Kerling, Hans Kippenberg, August Klapprott, Joseph Klein, Wilhelm Knaup, Fritz Koehler, Hermann Koetter, Maria Th. Kohler, Mathias Kohler, Bruno Koop, Jr., Bruno Koop, Sr., Arthur Kuehn, Wilhelm Lachnicht, Gotthilf Ludwig, Wilhelm Mank, Gertrude Neubacher, Otto Neubacher, George Neupert, Karl Nurnberger, John Olden, Willie Orths, Martin Ortner, Adolf Pasquay, Hans Poehner, Max Rapp, Hartwig Reese, Henry Reese, Kasper Rehle, Maximilian Reichel, Georg Riem-

schneider, Hermann Roehm, Anna Rubischon, Edwin Rubischon, Anton Ruebie, Gerhard Schacht, Wilhelm Schaumann, Karl Schelkshorn, Martin Schluckwerder, Hans Schmidt, Kurt Schmidt, Bernard Schmolke, Franz Schrader, Albert Schroeder, Siegfried Schulte, Karl Schweitzer, Kurt Schweitzer, Ernst Schwenk, Herman Schwinn, Herbert C. Seyfferth, Gerhard Sprenger, Meta Stoehr, Johann Stoll, Walter Sykora, Karl Uberschaer, Antonie Uhlig, Gregor Volkheimer, Otto Wagner, Hans Wichers, Johann Wiechers, Selma Wiechers, Paul Zitzmann,

and it being considered that, as to the above-named petitioners, the petition herein, in substance and in fact, constitutes an application for reconsideration of the decision refusing them a writ of habeas corpus in the said case of *Herman Agne et al.* v. *Tom C. Clark, Attorney General*, Habeas Corpus No. 3132, from which they have unsuccessfully appealed and have elected not to apply to the Supreme Court of the United States for a writ of certiorari, it is by the Court this 23d day of July, 1947,

Adjudged, Ordered and Decreed as follows:

That the Petitioners' application for a stay be, and the same hereby is, denied; the Respondent's motion be, and the same hereby is, in all respects, granted; and the amended petition and petition for writ of habeas corpus is hereby dismissed.

Bolitha J. Laws, Chief Justice.

Presented by Enoch E. Ellison, Special Assistant to the Attorney General.

It is hereby certified that a copy of the foregoing Order was this 23rd day of July, 1947, handed to James J. Laughlin, Esq., attorney for petitioners.

Enoch E. Ellison, Special Assistant to the Attorney General.

[fol. 14] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

[Title omitted]

NOTICE OF APPEAL—Filed July 24, 1947

Notice is hereby given this 24th day of July, 1947, that petitioners hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 23rd day of July, 1947, in favor of respondent against said petitioners.

James J. Laughlin, Attorney for Petitioners.

Mail notice to: E. E. Ellison, Attorney, Dept. of Justice, Washington, D. C.

[fol. 15] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

[Title omitted]

DESIGNATION OF RECORD—Filed August 1, 1947

The Clerk will please prepare the record in the above entitled cause and include therein the following:

1. Petition for writ of habeas corpus.
2. Amendment to petition.
3. Motion to dismiss.
4. Notice of appeal.
5. This designation.
6. Clerk's certificate.

James J. Laughlin, National Press Building, Counsel for Petitioners.

I certify that I have this day mailed copy of this designation of record to Enoch E. Ellison, Esq., Department of Justice, Washington, D. C.

James J. Laughlin.

This the 1st day of August, 1947.

[fol. 16] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 17] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Habeas Corpus No. 3243

PAUL AHRENS, ET AL., Appellants,

v.

TOM C. CLARK, Attorney General of the United States, Appellee

MOTION TO DISMISS—Filed August 15, 1947

Now comes the appellee, Tom C. Clark, Attorney General of the United States, and moves pursuant to Rule 75(j) of the Rules of Civil Procedure that the appeal herein be dismissed on the grounds:

1. That all of the appellants, who complain of the order of the Court below dismissing their petition for a writ of habeas corpus, as amended, were and are, and, by the petition, are alleged to be, without the territorial confines of the District of Columbia.

2. That all matters sought to be raised by the petition herein, as amended, which was dismissed by the Court below have been decided adversely to the appellants by this Court in earlier cases and proceedings.

3. That as to the appellants named in the order of the Court below entered herein on July 23, 1947, as having been petitioners also in the case of *Herman Agne et al.* v. *Tom C. Clark, Attorney General*, No. 3132 (No. 9449 of this Court), the petition herein, in substance and in fact, constituted an application to the Court below for reconsideration of its decision refusing them a writ of habeas corpus in the said case of *Herman Agne et al.* v. *Tom C. Clark, Attorney General*, from which they unsuccessfully appealed to this Court and, upon dismissal of such appeal, elected not to apply to [fol. 18] the Supreme Court of the United States for a writ of certiorari.

Respectfully submitted, Herbert A. Bergson, Acting Assistant Attorney General; George Morris Fay, United States Attorney; Enoch E. Ellison, Special Assistant to the Attorney General, Attorneys for Appellee.

Of Counsel: Clement L. McEachern, Attorney, Department of Justice.

[fol. 19] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

[Title omitted]

POINTS AND AUTHORITIES IN SUPPORT OF APPELLEE'S MOTION TO DISMISS

1. Appellants are all alien enemies. All of them are, and by the petition are alleged to be, held in the custody of the Immigration and Naturalization Service at Ellis Island, New York Harbor. None is now or has been since the petition was filed within the territorial confines of the District of Columbia.

A writ of habeas corpus will not lie to test the custody of persons outside the territorial jurisdiction of the Court where the writ is sought.

Herman Agne et al. v. *Tom C. Clark, Attorney General,* No. 9449 in this Court, decided February 24, 1947 (granting motion to dismiss based both on this ground and on the ground of *res judicata);*

United States ex rel. Lynn v. *Downer,* 323 U. S. 817 (denying rehearing of previous denial of certiorari because moot, 322 U. S. 756);

Ex Parte Gouyet, 175 Fed. 230 (D. Mont.);

United States ex rel. Belardi v. *Day,* 50 F. 2d, 816 (C. C. A. 3);

United States ex rel. Harrington v. *Schletfeldt,* 136 F. 2d, 935, 940 (C. C. A. 7);

Jones v. *Biddle,* 131 F. 2d, 853 (C. C. A. 8; cert. den. 318 U. S. 784);

In Re Bickley, 3 Fed. Cas. Co. No. 1387 (D. C. N. Y. 1865).

[fol. 20] 2. All issues sought to be raised in the petition herein have been decided adversely to the petitioners in cases to which they were parties.

Herman Agne et al. v. *Tom C. Clark, Attorney General, supra;*

Citizens Protective League et al. v. *Tom C. Clark, Attorney General,* 155 F. 2d, 290, cert. den. 329 U. S. 787;

Maria Bertelmann et al. v. *Tom C. Clark, Attorney General,* D. C. D. C., Civil Action No. 1435-47, petition dismissed July 21, 1947.

3. As more fully stated in appellee's opposition to appellants' petition for stay filed herein on July 30, 1947, to which reference is respectfully made, this is the sixth suit which has been brought by this group of alien enemies, and their fifth appeal to this Court, to prevent their removal from the United States pursuant to removal orders issued by the Attorney General under Presidential Proclamation No. 2655 promulgated July 15, 1945 and the Alien Enemy Act of 1798, 1 Stat. 577 (8 U. S. C. § 21). The Court below has found as to those appellants who were parties to the habeas corpus proceeding of *Herman Agne et al.* v. *Tom C. Clark, Attorney General, supra,* whose names appear in the District Court's order of July 23, 1947, that the petition in substance and in fact amounts to a request for reconsideration of the Court's dismissal of the petition in the *Agne* case. No change in the material facts relating to the appellants, since the filing of the petition in that case, is alleged. Every allegation of fact appearing in the present petition has been made in earlier cases of which this Court has judicial knowledge *(Booth* v. *Fletcher,* 69 App. D. C., 351, 101 F. 2d, 676, 679, and cases there cited).

In their petition for a stay, the appellants pointed to two allegations to the amendment to the petition as creating a material difference between the petition in this case and their earlier petition in the *Agne* case. These matters were [fol. 21] fully dealt with in the appellee's opposition to the petition for stay and the contentions apparently were abandoned at the time of the conference on the petition for a stay. Accordingly, it will suffice to point out as to the first contention, i.e., that as to certain appellants, "their citizenship was taken from them without due process of law and as a result of war hysteria", was made in the *Citizens Protective League* cases and was disposed of by this Court's opinion in that case. (See Joint Appendix in Nos. 9193, 9194 and 9195, p. 2, pars. 7 & 8; p. 8, pars. 3 & 5, and p. 10, par. 12. See, also, 155 F. 2d at 292). Since the allegation must have been omitted deliberately from the petition in the subsequent *Agne* case, its inclusion in a very vague manner in the present petition adds nothing to the refusal of the Court below to reconsider its previous action in the *Agne* case. Cf. *Sunal* v. *Large,* S. Ct. U. S., Nos. 535 and 840, Oct. Term 1946, decided June 23, 1947.

As to the second alleged difference, as we have previously pointed out, the contention that the war ended with the ces-

sation of hostilities insofar as the Alien Enemy Act of 1798 is concerned, with the consequence that the Executive Power of removal under that Act has come to an end, has been advanced in one form or another in each of the prior suits, including the *Agne* case. The contention was rejected by this Court in the *Citizens Protective League* cases (155 F. 2d at 295) and recently was rejected by the United States Circuit Court of Appeals for the Second Circuit. *United States ex rel. Kessler* v. *Watkins*, No. 279, Oct. Term 1946, filed June 24, 1947 (copies lodged with the Clerk).

At the conference on the appellants' petition for a stay, the contention was made, as we understand it, that the present case differed from the earlier cases in that when such earlier cases were instituted the removal orders had not yet been issued by the Attorney General as to most of the appellants. While this was true as to the majority of the appellants when the petition in the *Citizens Protective League* cases were filed, it is not understood that the decision [fol. 22] of this Court in any way turned upon that fact. In any event, the petition in the *Agne* case clearly alleges that at the time of its filing "the respondent is attempting to deport them [the petitioners] to Germany" and that the "respondent is seeking to deport by virtue of the Presidential Proclamation, dated July 14, 1945, which Presidential Proclamation was issued pursuant to the Alien Enemy Act of 1798" (Pars. 2-3).

Par. 1 of Rule 45 of the Rules of the Supreme Court and Rule 29(a) of the Rules of this Court are identical and are as follows:

> Pending review of a decision refusing a writ of habeas corpus, the custody of the prisoner shall not be disturbed.

The Court below has held that these rules are inapplicable to the appellants who were parties to the *Agne* suit. Obviously, it was not the intended purpose of the rules to permit private parties to tie the hands of Government officers by the mere filing of repeated suits and by notation of orders dismissing them. Plainly, this would be an interference with the purpose of the Congress in enacting the Alien Enemy Act of 1798 and with the powers delegated to the Chief Executive thereunder. It is respectfully submitted that the placing of such power in the hands of a private individual is not a proper exercise of judicial power and the

rule should not be construed so as to require that result. This would be true also if the rules should be construed to place a ministerial duty upon courts inferior to the Supreme Court to issue stays in such circumstances, because, in that event, the power of interference would in fact be placed in the hands of private parties. It is not questioned that both the courts and the executive officers of the Government should so act as to safeguard the remedy of habeas corpus to every reasonable degree. Heretofore in these cases it has not been necessary for the appellants to ask the Court for stays or injunctions *pendente lite*. However, it is submitted that the time has now come when the appellants have had every reasonable opportunity to present their cases to the courts and that, at least as to those appellants named in [fol. 23] the order of the court below, who have previously applied for habeas corpus relief, the District Court was plainly correct in deciding that the rules in question were inapplicable. While the rules literally cover "a decision refusing a writ of habeas corpus", they do not expressly cover a decision dismissing a petition which in substance and in fact is a request for reconsideration of an earlier decision refusing such a writ. They should not be so construed.

Conclusion

For the foregoing reasons the appeal, in all respects, should be dismissed.

Respectfully submitted, Herbert A. Bergson, Acting Assistant Attorney General; George Morris Fay, United States Attorney; Enoch E. Ellison, Special Assistant to the Attorney General.

Of Counsel: Clement L. McEachern, Attorney, Department of Justice.

[fol. 24] Service acknowledged of a copy of the foregoing Motion to Dismiss and of the memorandum of Points and Authorities in support thereof, this 15 day of August, 1947.

(S.) James J. Laughlin, Attorney for Appellants.

Notice

James J. Laughlin, National Press Building, Washington, D. C., Attorney for Appellants.

Please be advised that memorandum of points and authorities in support of the foregoing motion is attached

hereto. The rules of the above entitled Court require that if you oppose the granting of this motion, you shall, within five days or such further time as the Court may allow or the parties may agree upon, file in reply a memorandum of points and authorities in opposition thereto.

Clement L. McEachern, Attorney, Department of Justice.

[fol. 25] IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

[Title omitted]

OPPOSITION TO MOTION TO DISMISS—Filed August 22, 1947

At the outset we raise the point that the case is not properly here for disposition inasmuch as the record has not been prepared by the District Court in due course for filing in this Court. We expect the record to be ready within the next few days. We also desire to call attention to the fact that there has been filed in District Court notice of appeal in the case of Bertelmann et al. vs. Clark. Designation of record has been prepared and record is now being assembled for filing in this Court. This Court theretofore could not properly pass upon the motion to dismiss until it had before it all points raised in the Bertelmann case to enable this Court to determine whether or not the points raised in the present habeas corpus case and the Bertelmann case are different from the points previously raised and passed upon by this Court.

We also desire to call attention to the fact that this case should be considered in the light of the decision of the Second Circuit in the case of *Von Heymann vs. Watkins*, 159 F. (2d) 650. The Second Circuit Court determined in that case that enemy aliens should have a reasonable opportunity to depart from the United States and there has as yet been no determination as to what the reasonable time [fol. 26] element contemplates. We also desire to call attention to the fact that Section 24, Title 50, U. S. Code, provides as follows:

> "When an alien enemy is required by the President, or by order of any court, judge, or justice, to depart and to be removed, it shall be the duty of the marshal

of the district in which he shall be apprehended to provide therefor and to execute such order in person, or by his deputy or other discreet person to be employed by him, by causing a removal of such alien out of the territory of the United States; and for such removal the marshal shall have the warrant of the President, or of the court, judge, or justice ordering the same, as the case may be."

We also desire to call attention to the fact that an attempt to remove these persons is in violation of the Constitutional provisions against:

a. Unlawful delegation by the President of a judicial function which it is his duty to exercise and which he cannot delegate (Const. Art. 1, Sec. 1; Art. VI, Sec. II);

b. The passage of bills of attainder or ex poste facto laws (Const. Art. 1, Sec. IX);

c. Conviction of any person of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court, appellants having been accused in said removal order of adhering to an enemy of the United States, which is defined as treason (Const. Art. III, Sec. III);

d. Violation of the laws of the United States and of all treaties made under their authority (Const. Art. VI, Sec. II);

e. Abridging the freedom of speech or of the press (1st Amdt.);

f. Invasion of appellants' personal rights to be secure in his person, house, papers and effects (4th Amdt.);

g. Against holding appellants to answer for an infamous crime without a presentment or indictment of a grand jury and depriving appellants of their life, liberty and property without due process of law (5th Amdt.);

h. Depriving appellants of a speedy and public trial, re- [fol. 27] fusing to inform them of the nature and cause of the accusations against them, denying them the right to be confronted with witnesses against them and denying them the right to have the assistance of counsel (6th Amdt.);

i. Imposing excessive fines and inflicting cruel and inhuman punishment on appellants (8th Amdt.);

j. Subjecting appellants to slavery and involuntary servitude in a place subject to the jurisdiction of the United

States, despite the fact that they have not been accused of, nor tried for, nor convicted of any crime (13th Amdt.).

A question has been raised that the allegations in the case here for review and the Bertelmann case now on the way to this Court present no new questions. We desire to call attention to the fact that in the present case the following is found in the amendment to the writ of habeas corpus:

> "A considerable number of the petitioners herein are not in fact alien enemies, as defined in the Act of July 6, 1798, Title 50, Section 21, United States Code, in that their citizenship was taken from them without due process of law and as a result of war hysteria. Petitioners ask the Court for an opportunity to present evidence on this aspect of the case."

With respect to this we will be able to show that a considerable number of the appellants had their citizenship wrongfully taken from them and if the action was wrongful and without regard to due process of law they would not in fact be alien enemies and could not be removed by virtue of the Presidential proclamation.

In the amendment filed in the present petition for habeas corpus, there appears this:

> "When the orders of removal were issued there was no longer a war and the petitioners were no longer alien enemies, as defined in the Act of July 6, 1798. A study of the Congressional debates which preceded the passage of this Act in 1798 will establish beyond question that in using the words 'declared war' and 'hostile nation or government', the legislators had in mind 'war in fact' or 'actual hostilities' and not a technical 'state of war'."

[fol. 28] We contend that this raises a very serious question and one that definitely distinguishes the writ of habeas corpus in the present case as compared with the prior writ.

The amendment to the present writ reads further as follows:

> "When this Act was written in the spring of 1798, two grave problems faced the legislators. One was the tremendous power being asserted over all Europe by the French, a power which even then threatened to

spread across the Atlantic and engulf the United States (see Bas vs. Tingy, 1800, 4 Dallas 37, at 40). The other was the serious internal struggle between the States and the Federal Government for the control of migration of aliens. As Albert Gallatin pointed out during these very debates

> '* * * by turning to the 9th section of the Constitution, it is found that the migration of such persons (aliens) as any of the States shall think proper to admit, shall not be prohibited by Congress prior to the year 1808.'

In view of the proclamation issued to the people of Germany and in view of the official declaration of the Department of State declaring the complete demise of the German government, the cessation of actual hostilities and the assumption of supreme authority by the Allied Powers as to every function of the former German government, it is respectfully submitted that not later than October 29, 1945 the political branch of the United States Government had ended the war with Germany so far as the Alien Enemy Act of 1798 is concerned.

When the orders of removal of the petitioners were issued there was neither any 'hostile nation or government' of which they were natives or citizens, nor any such entity against which the United States could any longer be at war within the purport of the Alien Enemy Act.

In this connection, particular emphasis is placed on the Presidential Proclamation of May 8, 1945, stating that there had been won 'from Germany a final and unconditional surrender.' In other words, the President has made 'public proclamation of the event,' (see Section 21, Title 50, U. S. C. A.), that so far as Germany is concerned, no further act of war or peace can be done. The capitulation is final. When this extraordinary event was followed by the official proclamation of the United States Department of State that the four Powers were assuming all functions of the extinct German government, the political branch of the Government has most certainly declared an end to the war as provided in the Alien Enemy Act.

This aspect of political action is emphasized because it has been the practice of the courts in cases dealing

with the Alien Enemy Act to avoid the issue of war termination by stating that this is a political question. [fol. 29] For example, in *United States ex rel. Hack vs. Clark* (C. C. A. 7th 1947), 159 F. (2d) 552, it is stated:

> 'Whether the country from whence he came is still at war with the United States or is still in existence as a sovereign power is not for any court to say; that is a political question to be answered only by those branches of our Government charged with the responsibility of political decisions, namely, the executive and legislative branches. Jones vs. United States, 137 U. S. 202, 11 S. Ct. 80, 34 L. Ed. 691; Citizens Protective League vs. Clark.'

There is no disagreement with the principle asserted in this line of decisions. On the other hand, where the political branch of the Government has taken the steps proclaiming the final defeat, the complete demise and the substitution of its own power in the place of the hostile nation or government, that action compels judicial recognition in the application of a statute such as the Alien Enemy Act.

We say in view of this that there is no lawful authority to remove these persons to Germany inasmuch as there is no existing government of Germany."

The view taken by the appellee practically amounts to a denial of the Constitutional guarantees to these appellants. It cannot be contended that the hearing accorded them was consistent with due process of law. A hearing, to conform to due process of law, permits the accused to confront his accusers, to cross-examine the witnesses appearing against him, to offer testimony in his own behalf and to have the assistance of counsel. We have never understood that the mere fact that persons are enemy aliens should be reason for depriving them of these Constitutional safeguards. In the case of *Application of Yamashita*, 68 Sup. Ct. 340, 327 U. S. 1, we find this in the dissenting opinion of Justice Murphy:

> "The Fifth Amendment guarantee of due process of law applies to 'any person' who is accused of a crime by the Federal Government or any of its agencies. No exception is made as to those who are accused of war

crimes or as to those who possess the status of an enemy belligerent. Indeed, such an exception would be contrary to the whole philosophy of human rights which makes the Constitution the great living document that it is. The immutable rights of the individual, including those secured by the due process clause of the Fifth Amendment, belong not alone to the members of those nations that excel on the battlefield or that subscribe to the democratic ideology. They belong to [fol. 30] every person in the world, victor or vanquished, whatever may be his race, color or beliefs. They rise above any status of belligerency or outlawry. They survive any popular passion or frenzy of the moment. No court or legislature or executive, not even the mightiest army in the world, can ever destroy them. Such is the universal and indestructible nature of the rights which the due process clause of the Fifth Amendment recognizes and protects when life or liberty is threatened by virtue of the authority of the United States."

In the dissenting opinion of Justice Rutledge, in the same case, we find this:

"Wholly apart from the violation of the Articles of War and of the Geneva Convention, I am completely unable to accept or to understand the Court's ruling concerning the applicability of the due process clause of the Fifth Amendment to this case. Not heretofore has it been held that any human being is beyond its universally protecting spread in the guaranty of a fair trial in the most fundamental sense. That door is dangerous to open. I will have no part in opening it. For once it is ajar, even for enemy belligerents, it can be pushed back wider for others, perhaps ultimately for all.

The Court does not declare expressly that petitioner as an enemy belligerent has no constitutional rights, a ruling I could undertsand but not accept. Neither does it affirm that he has some, if but little, constitutional protection. Nor does the Court defend what was done. I think the effect of what it does is in substance to deny him all such safeguards. And this is the great issue in the cause."

And in conclusion Justice Rutledge said:

> "I cannot accept the view that anywhere in our system resides or lurks a power so unrestrained to deal with any human being through any process of trial. What military agencies or authorities may do with our enemies in battle or invasion, apart from proceedings in the nature of trial and some semblance of judicial action, is beside the point. Nor has any human being heretofore been held to be wholly beyond elementary procedural protection by the Fifth Amendment. I cannot consent to even implied departure from that great absolute.
>
> It was a great patriot who said:
>
> 'He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach himself.' (From the writings of Thomas Paine)."

It is our view, therefore, that substantial questions are involved in this appeal and that it should be heard on the merits in the regular course and the motion to dismiss should be denied.

[fol. 31] James J. Laughlin, National Press Building, Counsel for Appellants.

I certify that I have this day mailed copy of this opposition to Enoch E. Ellison, Esq., Department of Justice, Washington, D. C.

James J. Laughlin.

This the 22nd day of August, 1947.

[fol. 32] UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, OCTOBER TERM, 1947

No. 9613

PAUL AHRENS, et al., Appellants,

v.

TOM C. CLARK, Attorney General of the United States,

Appellee

Before Stephens, Clark and Prettyman, JJ.

ORDER DISMISSING APPEAL—October 30, 1947

On consideration of appellee's motion to dismiss the appeal herein, and of appellants' opposition thereto, it is

Ordered by the Court that this appeal be, and it is hereby, dismissed. *Sanders* v. *Bennett*, 80 U. S. App. D. C. 32, 148 F. (2d) 19 (1945); *U. S. ex rel. Harrington* v. *Schlotfeldt*, 136 F. (2d) 935 (C. C. A. 7, 1943); *Jones v. Biddle*, 131 F. (2d) 853 (C. C. A. 8, 1942); *U. S. ex rel. Belardi* v. *Day*, 50 F. (2d) 816 (C. C. A. 3, 1931).

Per Curiam.

Dated October 30, 1947.

[fol. 33] IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

[Title omitted]

DESIGNATION OF RECORD—Filed November 13, 1947

The Clerk will please prepare the record for the Supreme Court of the United States in the above entitled cause and include therein the following:

1. Transcript of record.
2. Motion to dismiss.
3. Opposition to motion to dismiss.
4. Order dismissing cause.

5. This designation of record.
6. Clerk's certificate.

James J. Laughlin, National Press Building, Counsel for Appellants.

I certify that I have this day mailed copy of this designation of record to Enoch E. Ellison, Esq., Special Assistant to the Attorney Geenral, Department of Justice, Washington, D. C.

James J. Laughlin.

This the 12th day of November, 1947.

[fol. 34] UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

[Title omitted]

ORDER RE ORIGINAL RECORD—November 18, 1947

On consideration of appellants' motion to authorize the Clerk to transmit the original transcript of record in the above entitled cause to the Supreme Court for use in connection with petition for review on writ of certiorari, It is

Ordered by the Court that the motion be, and it is hereby, granted.

Per Curiam.

Dated November 18, 1947.

[fol. 35] Clerk's Certificate to foregoing transcript omitted in printing.

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CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No brief filed for petitioners on merits

No. 446

PAUL AHRENS, ET AL.,
Petitioners,

vs.

TOM C. CLARK, ATTORNEY GENERAL OF THE UNITED STATES,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

JAMES J. LAUGHLIN,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 446

PAUL AHRENS, ET AL.,

Petitioners,

vs.

TOM C. CLARK, ATTORNEY GENERAL OF THE UNITED STATES,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

To the Honorable Fred M. Vinson, Chief Justice of the Supreme Court of the United States and Associate Justices of the Supreme Court of the United States:

The petitioners, Paul Ahrens, Max Armbruster, Willi Backofen, Paul Bante, Maria Bertelmann, Else Brink, Walter Brink, Karl J. Boehm, Max Blank, Otto Braunger, Albert Brueckner, Alrich Cappelmann, Ernst E. Christoph, Hans Diebel, Hans Doelle, Johann R. Enders, Walter Engelbert, Wilhelm Engelbert, Anna Faller, Xaver Faller, Richard Felis, Walter Feltz, John C. Fitting, Kurt Fries, Luise Fritsch, Rudolf Funk, Paul Geis, Adolf Goelzer, Otto

Grimm, Georg Grytzyk, Rudolf Gudert, Wilhelm Hack, Helene Hackenberg, Rudolf Hackenberg, Robert Hartmann, Albert Haug, Erna Haupt, Heinz Heinzen, Werner Hofling, Hedwig Hohmann, Martin Hohmann, Paul Hohmann, Hermann Hoehn, Kurt Holz, Andreas Heinrich Jans, Hans Juhl, Johannas L. Jung, Wolfgang T. Jung, Wilhelm Kaecher, Joseph Kaiser, Marie Kerling, Julius Kessler, Hans Kippenberg, August Klapproth, Josef Klein, George B. Knaepper, Paul Knauer, Wilhelm Knaup, Fritz Koehler, Hermann Koetter, Mathias Kohler, Hans H. Kohpeiss, Albert Kolb, Bruno Koop, Jr., Bruno Koop, Sr., Alfred Krakau, Heinz Krebs, Joseph Kuehn, Wilhelm Lachnicht, Ernst Lack, Hans Laudage, Alois Lieb, Gotthilf Ludwig, Wilhelm Mank, Elisabeth Meuser, Waldemar Meuser, Gertrud Neubacher, Otto Neubacher, Georg Neuper, Karl Nuernberger, John Oldin, Martin Ortner, Adolph Pacquay, Hans Poehner, Max Rapp, Rosine Rapp, Erich Raubenheimer, Hartwig Reese, Henry Reese, Kasper Rehle, Maximilian Reichel, Werner Reimann, Ludwig Resch, Georg Riemenschneider, Hermann Roehm, Theodore Kurt Roehner, Anna Rubischon, Edwin Rubischon, Anton Ruble, Gerhard Schacht, Peter Schau, Wilhelm Schaumann, Karl Schluckwerder, Hans J. Schmidt, Kurt Schmidt, Bernhard Schmolke, Hans Schnoor, Franz Schrader, Albert Schroeder, Siegfried Schulte, Karl Schweitzer, Kurt Schweitzer, Ernst Schwenk, Hermann Schwinn, Herbert C. Seyfferth, Gerhard Sprenger, Agnes Stephan, Meta Stoehr, Johann Stoll, Walter Sykora, Karl Ueberschoer, Hugo Unrecht, Otto Wagner, Hans E. Weik, Hans Wichers, Johann Wichers, Selma Wichers, Maria Willumeit and Paul Zitzmann, respectfully petition this Court to grant a writ of certiorari to the United States Court of Appeals for the District of Columbia to remove therefrom for review here the record in Case No. 9613, wherein petitioners are appellants and respondent is appellee, and in which case the Court an-

nounced its decision under date of October 30, 1947 dismissing the appeal thereby affirming the action of the District Court of the United States for the District of Columbia.

Basis of Jurisdiction

The jurisdiction of this Court is invoked under Section 240A of the Judicial Code, as amended by the Act of February 13, 1925.

The judgment to be reviewed is the judgment of the United States Court of Appeals for the District of Columbia announced on October 30, 1947.

Summary Statement of Matter Involved

The litigation initiated in the District Court of the United States for the District of Columbia challenges the authority of the Attorney General of the United States to remove from this country the petitioners, who are German Nationals and threatened with deportation as alien enemies. No contention has been made that the persons named have violated any of the immigration laws which would subject them to deportation. The question presented is the right to remove persons who, it is contended, were members of the Nazi party or adhered to the Nazi form of government. It is our contention that since the war, for all intents and purposes, is at an end there is no lawful authority for removing these persons. There has been considerable litigation with respect to this subject matter and the basis of the motion to dismiss filed by the respondent in the United States Court of Appeals for the District of Columbia was to the effect that the matter had already been finally determined. A petition for a writ of *habeas corpus* was filed and same was refused. Under the applicable rules it was contended that pending review of a decision refusing a writ of *habeas corpus* the custody of the prisoners shall not be

disturbed. The District Court took the view that this rule was not applicable in the instant case. The United States Court of Appeals, however, held that it was applicable and granted a stay pending determination by them of the motion to dismiss.

Questions Presented

1. There is no lawful authority for removal of petitioners.

2. A considerable number of the petitioners are not alien enemies and hence could not be removed.

3. When the orders of removal were issued there was no longer a war and the petitioners were no longer alien enemies as required in the Alien Enemy Act.

Reasons Relied upon for Allowance of Writ of Certiorari

There are serious constitutional questions involved in this petition which should be passed upon by this Court. The right of the Government of the United States to remove aliens from our land and to permit them to be sent perhaps to the slave labor camps in the Russian zone of occupation in Germany is revolting to our sense of justice. This Court should determine the question as to whether the war is now at an end and whether the proclamation by the President of the United States is now binding.

The fact that there has been prior litigation with respect to these petitioners is not determinative of the question here.

WHEREFORE, your petitioners respectfully pray:

1. That writ of certiorari issue by this Court directed to the United States Court of Appeals for the District of Columbia commanding that Court to certify and send to this Court for its review and determination a full and complete transcript of the record of all proceedings in

Case No. 9613, *Paul Ahrens, et al.* v. *Tom C. Clark*, Attorney General of the United States.

2. That the judgment of the Court below be reversed by this Court.

3. That your petitioners have such other and further relief in the premises as to this Court may seem just.

JAMES J. LAUGHLIN,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 447

PAUL AHRENS, ET AL.,

Petitioners,

vs.

TOM C. CLARK, ATTORNEY GENERAL OF THE UNITED STATES,

Respondent

BRIEF IN SUPPORT OF PETITION

The United States Court of Appeals for the District of Columbia, on October 30, 1947, granted the motion of the Attorney General to dismiss.

Jurisdiction

The jurisdiction of this Court is invoked under Section 240a of the Judicial Code, as amended by Act of February 13, 1925.

Statement of the Case

A concise statement of the case containing, as petitioners believe, all that is material to the consideration of the questions presented, is set forth in the petition under "Summary Statement of Matter Involved," and is not repeated here.

Argument

Immediately after Pearl Harbor on December 8, 1941, the President issued a proclamation pursuant to Sections

21, 22, 23 and 24 of Title 50 of the United States Code (the Alien Enemy Act) providing in part, as follows:

> "All alien enemies shall be liable to restraint, or to give security, or to remove and depart from the United States in the manner prescribed by sections 23 and 24 of title 50 of the United States Code, and as prescribed in the regulations duly promulgated by the President."

As a result of the above the petitioners were interned and have been in confinement virtually since the end of 1941.

On July 14, 1945, the President issued Proclamation 2655, providing in part as follows:

> "All alien enemies now or hereafter interned within the continental limits of the United States pursuant to the aforesaid proclamations of the President of the United States who shall be deemed by the Attorney General to be dangerous to the public peace and safety of the United States because they have adhered to the aforesaid enemy governments or to the principles of government thereof shall be subject upon the order of the Attorney General to removal from the United States and may be required to depart therefrom in accordance with such regulations as he may prescribe."

Early in 1919, after the Armistice of the first war and before the ratification of the peace treaty, United States Attorney General Gregory rendered the following opinion:

> "February 5, 1919.
>
> Hon. John L. Burnett, Chairman, Committee on Immigration and Naturalization, House of Representatives, Washington, D. C.
>
> SIR:
>
> At our request you have introduced House Bill No. 14948, the object of which is to provide for excluding and deporting in proper cases persons who, during the

war, have either been convicted of war offenses or interned by Presidential warrant as dangerous alien enemies.

Making allowance for these cases in which voluntary repatriation will be accomplished, there will apparently remain in the internment camps about 1,500 cases of dangerous alien enemies. Of this number the great majority are persons who, during the war, manifested hostility toward this country, and, in our opinion it would be highly dangerous to the safety of the country to permit them ever again to be at large here.

There is no law now on the statute books under which these persons can be excluded from the country, nor under which they can be detained in custody after the ratification of the peace treaty. Unless the bill introduced by you, or one similar in character is passed, it will become necessary on the ratification of peace to set free all of these highly dangerous persons.

In view of the gravity of this situation, we therefore take the unusual course of requesting jointly that you take the necessary steps to secure the immediate consideration and, if possible, passage of this measure by the House of Representatives.

Respectfully,

——— ———,

Attorney General,
The Secretary of Labor."

At the next session of Congress, an act was adopted on May 10, 1920, carrying out the opinion and request of the United States Attorney General. That act provided in part as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That aliens of the following classes, in addition to those for whose expulsion from the United States provision is made in the existing law, shall, upon the warrant of the Secretary of Labor, be taken into his custody and deported in the manner provided in

> Sections 19 and 20 of the Act of February 5, 1917, entitled 'An Act to regulate the immigration of aliens to, and the residence of aliens in, the United States,' if the Secretary of Labor, after hearing, finds that such aliens are undesirable residents of the United States, to wit:
>
> (1) All aliens who are now interned under section 4067 of the Revised Statutes of the United States and the proclamations issued by the President in pursuance of said section under date of April 6, 1917, November 16, 1917, December 11, 1917, and April 19, 1918, respectively."

When the United States Attorney General expressed the opinion that there was "no law now on the statute books under which internees could be excluded from the country," he had before him the Alien Enemy Act, for # 4067 of the Revised Statutes mentioned in the Act of Congress, is that act itself. In saying that these persons could not be "excluded" from the country, he certainly meant "expelled" as well as "denied readmission." Excluded commonly means expelled, and they certainly had to be expelled, before they could be kept out.

This opinion of the United States Attorney General is not relied upon as having any binding effect upon his successors in office. It is submitted, however, to indicate that there is strong justification for the arguments which are presented here.

As to those petitioners who were not aliens, it is our contention that they could not under any circumstances be removed.

It should be made clear that the powers of the Executive with respect to removal are comparable neither to the powers of court-martial, nor to the powers authorizing the punishment of war criminals (see *Kahn* v. *Anderson*, 1921, 255 U. S. 1, 9; *Matter of Yamashita*, 1946, 327 U. S. 1, 9-11, relied on in *United States ex rel. Schlueter* v. *Watkins*,

67 Fed. Supp. 557, at 564). The power of the Executive to direct removal flows exclusively from the Alien Enemy Act of July 6, 1798. The pertinent provisions defining the scope of the Executive's power in that act are to be found in Section 21 of 50 United States Code:

> "Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies."

A study of the congressional debates which preceded the passage of this act in 1798 will establish beyond question that in using the words "declared war" and "hostile nation or government," the legislators had in mind "war in fact" or "actual hostilities" and not a technical "state of war."

When this act was written in the Spring of 1798, two grave problems faced the legislators. One was the tremendous power being asserted over all Europe by the French, a power which even then threatened to spread across the Atlantic and engulf the United States (see *Bas* v. *Tingy*, 1800, 4 Dallas 37, at 40). The other, was the serious internal struggle between the States and the Federal Government for the control of migration of aliens. As Albert Gallatin pointed out during these very debates:

> "• • • by turning to the 9th section of the Constitution, it is found that the migration of such persons (aliens) as any of the States shall think proper to admit, shall not be prohibited by Congress prior to the year 1808."

Thus, on the one hand, there was the desire to give the Executive the power to deal with French nationals in the case of actual hostilities without a declared war. And on the other, there was the recognition that until 1808 the power over aliens rested exclusively with the States, except in the case of a "declared war." So strong was the legislative intent that the Executive should have the power in the case of actual hostilities, and only in such event, that it is most doubtful that the words "declared war" would have ever appeared in the statute but for the constitutional problem existing until 1808.

Albert Gallatin described this dilemma when speaking with respect to a motion of Congressman Sitgreaves. The latter had suggested that the aliens who should be subject to removal should be natives, citizens, etc., of any nation which had "declared hostilities against the United States." Responding to the motion, Albert Gallatin said, at pp. 1581-2 of the Congressional Record for Thursday, May 3, 1798:

> "He would suggest to his colleague that part of the Constitution which might be in the way of this motion. A distinction was made by it between actual hostility and war.
>
> If it had only gone to have made a difference between declared and actual war, by striking out the word "declare," it would have removed the objection. If there be a difference between a state of war and actual hostility, there is also a difference in the relation between alien subjects of a nation with whom we are at war, and those of a nation with whom we are in a state of actual hostility."

Because the legislators finally adopted the phrase "declared war" in order to afford the Federal Government with the necessary constitutional authority, it does not follow that they intended that the Executive should possess

this extraordinary power at times other than "actual hostility" or "war in fact."

That Congress intended this power of the Executive to be coterminous with actual hostilities is demonstrated beyond question by the principal debates. Congressman Otis of Massachusetts, the leading proponent of the bill, spoke of its purpose, as follows:

> "It is proposed by this resolution to give the President the power to remove aliens, when the country from which they came shall threaten an invasion."
>
> • • • • • • •
>
> "Gentlemen talk about a declaration of war. No such thing scarcely ever precedes war. War and the declaration of war come together, like thunder and lightning. Indeed, if France finds she can enfeeble our councils by refraining to declare war, and that we will take no measures of effectual defence until this is done, it is probable she will not declare it, but continue to annoy us at present."

Further indication of the fact that the legislators were thinking of war in terms of actual hostilities was the statement of Congressman Sewall, himself an outspoken opponent of the bill.

> "France, said he (Mr. Sewall), has now done towards the United States what might be considered as hostility. Suppose we pass a law which calls upon the President to act, what ought the President to do? Was he to determine the point whether France has authorized hostilities against the United States?"

Almost conclusive proof that the legislators were aiming to limit the powers of the President is an amendment which Congressman Allen proposed and was thereafter obliged to withdraw.

> "Mr. Allen said, he would move an amendment which would supersede that under consideration, by making

the resolution extend to all aliens in this country. He wished to retain none of the restraints which are in the present resolution."

* * * * * * *

"It did not appear to him necessary to have the exercise of this power depend upon any contingency, such as a threatening of invasion, or war, before it could be exercised. He wished the President to have it at all times. He moved an amendment to this effect, which went to enable the President to remove at any time the citizen of any foreign country whatever, not a citizen, regarding the treaties with such countries."

That the legislators intended that war as included in the Alien Enemy Act should be "war in fact" and not a technical "state of war" is conclusively established by their failure to adopt those very terms. They were proposed in a motion by Congressman Sewall to define those aliens who should be subject to the liabilities of this act as those of a government

"between which and the United States shall exist a state of war."

Congressman Otis strongly opposed this definition of "war" on the ground that it might not permit the use of the power in a case of actual hostilities apart from a state of war. He had previously stated:

"* * * that in a time of tranquillity, he should not desire to put a power like this into the hands of the Executive; but in a time of war, the citizen of France ought to be considered and treated and watched in a very different manner from citizens of our own country."

Were there any question as to the intent of the legislators at that time, the Court is respectfully referred to James

Madison's report on the Virginia Resolutions, which is quoted from by Judge Rifkind in the *Schlueter* case at 67 Fed. Supp. 564, as follows:

> "* * * much confusion and fallacy have been thrown into the question, by blending the two cases of aliens, members of a hostile nation, and aliens, members of friendly nations."

In the light of this record, there can be no doubt that Congress in passing the Alien Enemy Act and in using the words "declared war" and defining who were subject to removal as natives, etc., of a "hostile government or nation" were granting the Executive these extraordinary powers solely during times of actual hostilities or "war in fact" and not during the tranquillity of a theoretical "state of war."

This undoubtedly was what lead United States Attorney General Gregory to the conclusion expressed in his opinion to Congress after the first war. The reasons for adopting his view are even more compelling after this war. Unlike the Armistice of the first war, in this war the termination of hostilities was carried out as follows:

> "We the undersigned, acting by authority of the German High Command, hereby surrender unconditionally to the Supreme Commander, Allied Expeditionary Force and simultaneously to the Soviet High Command all forces on land, sea, and in the air who are at this date under German control." (Official Text, Act of Military Surrender, May 7, 1945.)

The military surrender was followed by a Presidential Proclamation reading in part as follows:

> "By the President of the United States of America
> A Proclamation
>
> The Allied armies, through sacrifice and devotion and with God's help, have won from Germany a final

and unconditional surrender." (The Dept. of State Bull., Vol. XII, No. 307, p. 886, May 13, 1945).

On June 5, 1945, the Department of State of the United States Government, officially declared the total demise of the German State in a proclamation reading in part as follows:

"DEPARTMENT OF STATE

June 5, 1945.

No. 480

Confidential Release for Publication at 11:00 A. M., E. W. T., Tuesday, June 5, 1945. Not to Be Previously Published, Quoted from or Used in Any Way.

Declaration

regarding the defeat of Germany and the assumption of supreme authority with respect to Germany by the Governments of the United States of America, the Union of Soviet Socialist Republics and the United Kingdom and the Provisional Government of the French Republic.

The German armed forces on land, at sea and in the air have been completely defeated and have surrendered unconditionally and Germany, which bears responsibility for the war, is no longer capable of resisting the will of the victorious Powers. The unconditional surrender of Germany has thereby been effected, and Germany has become subject to such requirements as may now or hereafter be imposed upon her.

There is no central Government or authority in Germany capable of accepting responsibility for the maintenance of order, the administration of the country and compliance with the requirements of the victorious Powers.

It is in these circumstances necessary, without prejudice to any subsequent decisions that may be taken

respecting Germany, to make provision for the cessation of any further hostilities on the part of the German armed forces, for the maintenance of order in Germany and for the administration of the country, and to announce the immediate requirements with which Germany must comply.

The Representatives of the Supreme Commands of the United States of America, the Union of Soviet Socialist Republics, the United Kingdom and the Provisional Government of the French Republic, will hereafter determine the boundaries of Germany or any part thereof and the status of Germany or of any area at present being part of German territory."

On October 29, 1945, the Allied Control Council for Germany issued Proclamation No. 1 and No. 2 with respect to its powers and activities over Germany and German nationals. These proclamations read in part, as follows:

"PROCLAMATION No. 1
To the People of Germany

* * * * * * *

I

As announced on 5 June, 1945, supreme authority with respect to Germany has been assumed by the Governments of the United States of America, the Union of Soviet Socialist Republics, the United Kingdom, and the Provisional Government of the French Republic.

II

In virtue of the supreme authority and powers thus assumed by the four Governments the Control Council has been established and supreme authority in matters affecting Germany as a whole has been conferred upon the Control Council.

* * * * * * *

Done at Berlin, 30 August, 1945.

DWIGHT D. EISENHOWER,
General of the Army

B. H. ROBERTSON,
Lt. Gen.
Deputy for:

BERNARD L. MONTGOMERY,
Field Marshal

L. KOELTZ,
General de Corps d'Armee

pour P. KOENIG
General de Corps d'Armee

G. ZHUKOW,
Marshal of the Soviet Union"

. . . . . .

"PROCLAMATION No. 2

. . . . . .

Section III

5. The Allied Representatives will regulate all matters affecting Germany's relations with other countries. No foreign obligations, undertakings or commitments of any kind will be assumed or entered into by or on behalf of German authorities or nationals without the sanction of the Allied Representatives.

6. The Allied Representatives will give directions concerning the abrogation, bringing into force, revival or application of any treaty, convention or other international agreement, or any part of provision thereof, to which Germany is or has been a party.

7. (a) In virtue of the unconditional surrender of Germany, and as of the date of such surrender, the diplomatic, consular, commercial and other relations of the German State with other States have ceased to exist.

(b) Diplomatic, consular, commercial and other officials and members of service missions in Germany of countries at war with any of the four powers will be dealt with as the Allied Representatives may prescribe. The Allied Representatives may require the withdrawal from Germany of neutral diplomatic, consular, commercial and other officials and members of neutral service missions.

(c) All German diplomatic, consular, commercial and other officials and members of German service missions abroad are hereby recalled. The control and disposal of the buildings, property and archives of all German diplomatic and other agencies abroad will be prescribed by the Allied Representatives.

8. (a) German nationals will, pending further instructions, be prevented from leaving German territory except as authorized or directed by the Allied Representatives.

(b) German authorities and nationals will comply with any directions issued by the Allied Representatives for the recall of German nationals resident abroad, and for the reception in Germany of any persons whom the Allied Representatives may designate."

In view of the foregoing proclamation and in view of the official declaration of the Department of State previously quoted, declaring the complete demise of the German Government, the cessation of actual hostilities and the assumption of supreme authority by the Allied Powers as to every function of the former German Government, it is respectfully submitted that not later than October 29, 1945, the political branch of the United States Government had ended the war with Germany so far as the Alien Enemy Act of 1798 is concerned.

By the time the majority of the petitioners were issued orders of removal there was neither any "hostile nation or government" of which they were natives or citizens, nor any such entity against which the United States could any

longer be at war within the purport of the Alien Enemy Act.

In this connection, particular emphasis is placed on the Presidential Proclamation of May 8, 1945, stating that there had been won "from Germany a final and unconditional surrender." In other words, the President has made "public proclamation of the event" (see Section 21, Title 50, U. S. C. A.), that so far as Germany is concerned, no further act of war or peace can be done. The capitulation is final. When this extraordinary event was followed by the official proclamation of the United States Department of State that the four Powers were assuming all functions of the extinct German Government, the political branch of the Government has most certainly declared an end to the war as provided in the Alien Enemy Act.

This aspect of political action is emphasized because it has been the practice of the courts in cases dealing with the Alien Enemy Act to avoid the issue of war termination by stating that this is a political question.

For example, in *United States ex rel. Hack* v. *Clark* (C. C. A. 7th 1947), 159 F. (2d) 552, it is stated:

> "Whether the country from whence he came is still at war with the United States or is still in existence as a sovereign power is not for any court to say; that is a political question to be answered only by those branches of our Government charged with the responsibility of political decisions, namely, the executive and legislative branches. *Jones* v. *United States*, 137 U. S. 202, 11 S. Ct. 80, 34 L. Ed. 691; *Citizens Protective League v. Clark, supra.*"

There is no disagreement with the principle asserted in this line of decisions. On the other hand, where the political branch of the Government has taken the steps proclaiming the final defeat, the complete demise and the substitution of its own power in the place of the hostile nation or govern-

ment, that action compels judicial recognition in the application of a statute such as the Alien Enemy Act.

We believe that the cases of *United States* v. *Uhl*, 137 F. (2d) 898, and *United States ex rel. Hack* v. *Clark*, (C. C. A. 7th 1947), 159 F. (2d) 552, are points for the proposition that *habeas corpus* is the proper remedy in this case.

We also ask that this Court consider in this case the case of *Von Heymann* v. *Watkins*, 159 F. (2d) 650. In that case the Second Circuit Court held in effect that a reasonable opportunity to depart from the United States must be given and as yet there has been no determination of reasonable time.

Conclusion

It is contended that in the interest of justice that the orders for removal of the German Nationals involved in this suit be annulled and set aside. Wherefore, it is respectfully submitted that a writ of certiorari should issue as prayed.

JAMES J. LAUGHLIN,
National Press Building,
Counsel for Petitioners.

FILE COPY

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No. 46

Supreme Court of the United States

October Term, 1947

Petitioner,

vs.

Respondent.

On Petition for Writ of Certiorari to the

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 446

PAUL AHRENS, ET AL.

v.

TOM C. CLARK, ATTORNEY GENERAL

MEMORANDUM IN OPPOSITION TO PETITIONERS' APPLICATION FOR A STAY

The respondent's opposition to petitioners' application for a stay rests upon his conviction that the institution of habeas corpus proceedings here involved constitutes an abuse of process. Under such circumstances, it is submitted that Rule 45 (1) of this Court is wholly inapplicable if its purpose and effect is, as petitioners suggest, to make mandatory the issuance of a stay "pending review of a decision refusing a writ of habeas corpus." For if such is the effect of the rule, petitioners can utterly frustrate the executive power of removal by the simple process of continually filing applications for a writ, albeit frivolous, and thus bring Rule 45 (1) into operation.

Petitioners are German alien enemies presently detained at Ellis Island, New York; orders of removal have been issued against them by the Attorney General under Presidential Proclamation 2655, promulgated on July 14, 1945, and the Alien Enemy Act of 1798, 1 Stat. 577, 8 U. S. C. 21. The proceeding herein, in connection with which petitioners' application for a stay order is made, is the most recent in a series of substantially identical litigations instituted by petitioners and their counsel against the Attorney General. All of the petitioners herein, 129 in number,[1] have been parties to one or more of the prior suits. The issues herein have all been determined adversely to petitioners in these prior suits. We respectfully submit that the instant proceeding is entirely frivolous and constitutes a flagrant abuse of the beneficial rule which protects petitions for writs of habeas corpus from the inflexible bar of prior adjudication. Petitioners' objective, as we stated at the outset, is continually to invoke an adjunct of the habeas corpus procedure, the judicial power to issue stay orders, as an end in itself, and to pervert this judicial power into an injunction for the perpetual frustration of the power of the executive branch over alien enemies. Claiming that Rule 45 (1) of the Rules of this Court automatically operates

[1] The petition for a writ of habeas corpus filed in the district court herein listed 139 petitioners. Ten are omitted in the petition for certiorari.

to freeze their custody at Ellis Island, petitioners seek to achieve in a series of losing litigations the very objective which they are unable to attain on the merits of any of their cases.[3]

The present proceeding was instituted by filing a petition for a writ of habeas corpus on July 17, 1947, in the District Court for the District of Columbia. In connection with a motion to dismiss filed on July 21, 1947, the Attorney General pointed out that the petition was substantially identical with the petition for a writ of habeas corpus unsuccessfully prosecuted by petitioners in a prior habeas corpus proceeding, under the caption *Hermann Ague, et al* v. *Tom C. Clark, Attorney General* (Habeas Corpus No. 3132, Dist. Court of D. of C.). The *Ague* habeas corpus proceeding was instituted by petitioners on December 10, 1946, immediately upon the denial by this Court of their petition for certiorari in *Citizens Protective League, et al.* v. *Tom C. Clark, Attorney General,* 155 F. 2d 290 (App. D. C.) certiorari denied, 329 U. S. 787. The district court entered an order dismissing the *Ague* case on the same day, and an appeal taken to the court below was dismissed by order

[3] Since it is our view that Rule 45 (1) is inapplicable to abuse of the habeas corpus procedure, it is unnecessary, in this proceeding, to do more than note the Government's view that Rule 45 (1) applies only to preclude the admission of a prisoner to bail when his habeas corpus application appears to be unmeritorious on its face; a reading of the remainder of Rule 45, dealing with more substantial applications, serves to confirm this construction.

dated February 24, 1947 (No. 9949 in the Court of Appeals for the District of Columbia). After the dismissal of this appeal, petitioners obtained stays of mandate for the full time within which they might have applied for certiorari upon the representation to the court below that they intended to do so. No such application was filed.[3]

Petitioners, to meet the challenge that the petition for a writ of habeas corpus originally filed herein was the same as that unsuccessfully prosecuted in the *Agne* case, filed an amended petition on July 23, 1947.[4] Petitioners contended in the district court and in the court below that their petition as amended raised two "new" issues which serve to distinguish it from the *Agne* case. The first of these alleged differences consisted of a vague allegation that "a considerable number of the petitioners herein are not, in fact, alien enemies * * * in that their citizenship was taken from them without due process of law and

---

[3] During this period, on April 3, 1947, petitioners filed in the District Court for the District of Columbia a complaint for a mandatory injunction, to which all of the petitioners herein were or became parties, under the caption *Maria Bertelmann, et al.* v. *Tom C. Clark, Attorney General*, Civil Action No. 1435-47. This proceeding was dismissed by order dated July 21, 1947, and a motion to dismiss the appeal which was taken is presently pending before the court below. No new issues of fact or law were presented by the *Bertelmann* proceeding.

[4] The amendment was permitted on the understanding that the Attorney General's motion to dismiss should apply to the petition as amended.

as a result of war hysteria." This allegation, collaterally attacking denaturalization judgments against a few of the petitioners, was plainly not new, it having been urged in the *Citizens Protective League* cases on behalf of the same parties (see Record in Nos. 586, 587, 588, October Term, 1946, p. 2, pars. 7 and 8; p. 8, pars. 3 and 5; and p. 10, par. 12); it was properly rejected by the Court of Appeals. 155 F. 2d at 292–293.[5] The second "new issue" which was asserted by petitioners consisted of a contention to the effect that the executive power over alien enemies under the Alien Enemy Act of 1798 lapsed with the cessation of hostilities.[6]

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[5] Petitioners seek to avoid the effect of the decision in the *Citizens Protective League* cases on identical allegations advanced herein on the ground that the original proceeding was a suit for injunction. The effect of the *Citizens Protective League* decision cannot validly be thus avoided. On the contrary, a comparison of these cases emphasizes the fact that petitioners' application for a writ of habeas corpus is a relitigation and can at best be characterized, as held by the district court, as a petition for reconsideration. As such it is clearly an improper use of habeas corpus procedure. *Sunal* v. *Large* and *Alexander* v. *United States ex rel. Kulick*, Nos. 535 and 840, October Term, 1946, decided June 23, 1947.

[6] It should be noted that this contention is the ground upon which the present petition for certiorari is prosecuted. Typewritten brief in Support of Petition for Certiorari, pp. 6–18. The petition for certiorari also contains a vague reference to *United States ex rel. Von Heymann* v. *Watkins*, 159 F. 2d 650 (C. C. A. 2), coupled with a statement that "* * * as yet there has been no determination of reasonable time * * *" within which an alien enemy is to depart from the United States. Presumably, petitioners mean that alien enemies should have reasonable time to depart from the United States

This contention had been advanced in one form or another in each of petitioners' prior suits. In the *Citizens Protective League* cases, the Court of Appeals specifically rejected the contention (155 F. 2d at 295), and it was explicitly made in the petition for a writ of certiorari filed in that case, Nos. 586, 587, 588, October Term, 1946. Certiorari denied 329 U. S. 781. The same contention had been alleged in the *Agne* case[4] and the *Bertelmann* case. See note 3, p. 5, supra.[5]

---

and that there has been no judicial determination as to what constituted a reasonable time. In this connection, it should be noted that the Court of Appeals in the *Citizens Protective League* cases, with reference to this same group of litigants, recited with approval the provision of the regulations of the Attorney General "for a 30-day notification of the order directing that the [the alien enemy] depart from the United States, and for his release, unless the public safety otherwise requires, for 30 days in order that he may settle his personal and business affairs * * * and make arrangements to depart from the country." 155 F. 2d at 295. If petitioners seek to inject this as an issue, it is a patently frivolous one.

[4] Paragraph 4 of petition for writ of habeas corpus in the *Agne* case reads as follows:

"4. Petitioners say unto the Court that the authority of the chief executive to remove from our shores enemy aliens rests upon the proposition that the country is at war. The country is not now at war and there is no legal basis for deporting these persons."

[5] Paragraph 7 of the complaint in the *Bertelmann* case reads, in pertinent part, as follows:

"7. Plaintiffs say unto the Court that the war powers under which the President of the United States is proceeding have not virtually come to an end and that being so that there is no legal basis for deporting these persons to Germany. Plaintiffs say further that it would be inhumane to deport them to Germany because the plan is to send them to

A hearing was held on the Attorney General's motion to dismiss, and on petitioners' oral application for a stay, on July 23, 1947, and an order dismissing the petition and denying an application for a stay was entered on the same day. Chief Justice Laws held that the petition for a writ of habeas corpus herein was identical with that fully prosecuted in the *Agne* case and that the present proceeding was merely an application for reconsideration of the decision in that case.

Upon petitioners' application for a stay order against the Attorney General in connection with removal proceedings, pending determination of petitioners' appeal to the court, the Court of Appeals held a hearing in chambers before Stephens and Clark, JJ. At that hearing, the court below indicated unwillingness to deny the requested stay in view of the possible automatic application of Rule 45 (1) of the Rules of this Court. While granting the stay, the court suggested that the Government file a motion to dismiss the appeal. The motion was filed and sustained by the court by order dated October 30,

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the Russian zone of occupation, which would mean perpetual servitude and perhaps death. Plaintiffs say further that while peace has not formally been declared, the emergency as such is at an end. Plaintiffs say further that a treaty is now in the making and as soon as same is ratified these persons will no longer be enemy aliens, and furthermore that there is no longer any threat to the peace and security and to the safety of the United States from the hands of the Germans, but the threat to our peace and security arises in another sphere."

1947. The petition for certiorari herein, coupled with the application for a stay order followed.

We believe that Rule 45 (1) is neither automatic nor self-operating. And we strongly urge that there is nothing in the circumstances of this case, as set forth above, to justify a favorable exercise of this Court's discretion to issue a stay order. This Court has recognized the propriety of an exercise of judicial administrative discretion to prevent abuse of the writ itself. *Wong Doo* v. *United States*, 265 U. S. 239; see also *Dorsey* v. *Gill*, 148 F. 2d 857 (App. D. C.), certiorari denied, 325 U. S. 890. In the *Wong Doo* case, a second petition for a writ of habeas corpus had been held by a district court to be subject to the doctrine of *res judicata*. The petitioner was a Chinese in custody under an order of deportation issued under the Immigration Act of February 5, 1917, 39 Stat. 874, and was attempting to delay the deportation by the use of habeas corpus. This Court, after holding that the doctrine of *res judicata* did not apply, stated (265 U. S. at 241):

> It does not follow that the judgment should be reversed; for it plainly appears that the situation was one where, according to a sound judicial discretion, controlling weight must have been given to the prior refusal. The only ground on which the order for deportation was assailed in the second petition had been set up in the first petition.

> The petitioner had full opportunity to offer proof of it at the hearing on the first petition; and, if he was intending to rely on that ground, good faith required that he produce the proof then. To reserve the proof for use in attempting to support a later petition, if the first failed, was to make an abusive use of the writ, of *habeas corpus*. No reason for not presenting the proof at the outset is offered. It has not been embodied in the record, but what is said of it there and in the briefs shows that it was accessible all the time. If an alien whose deportation has been ordered can do what was attempted here, it is easy to see that he can postpone the execution of the order indefinitely. Here the execution already has been postponed almost four years.
>
> We conclude that the judgment was right, although a wrong reason was given for it. The delay resulting from the course pursued by the petitioner has been unreasonable; * * *

It is clear that judicial power to protect against abuse of habeas corpus process itself *a fortiori* carries with it the power to prevent misuse of rules appurtenant to habeas corpus proceedings. Such supervision over habeas corpus proceedings and related rules of court is obviously within the realm of judicial administration and discretion. The view of Rule 45 (1), here urged by petitioners, would leave courts free to control

habeas corpus proceedings but powerless to prevent frivolous litigants from attaining their objectives by an automatic application of rules. The situation is sharply pointed up where, as here, the result is a perpetual injunction against the exercise of a plenary power over alien enemies which Congress has entrusted to the executive branch.

A second, and independent, basis for denial of petitioners' application for a stay, lies in the view taken by the District Judge herein, namely, that this proceeding is a mere application for reconsideration of a prior decision against these petitioners. The district court's view finds support in the decision of this Court in *Sunal* v. *Large* and *Alexander* v. *United States ex rel. Kulick*, Nos. 535 and 840, October Term, 1946, decided June 23, 1947. However, we prefer to rest our opposition to petitioners' application for a stay on the ground that the granting or denial of such an order is not automatic but is a matter sufficiently within judicial control so that it cannot be made the subject of continuing abuse.

In this regard, it is important to emphasize that the denial of the petition for certiorari herein in and of itself will not meet or solve the problem. As the past history of these litigations shows, petitioners can confront lower courts with relitigation. In each suit, their contention that a stay automatically issues under the Rules of this Court has been and will be treated with con-

siderable delicacy until this Court takes action on the point. The Court of Appeals in the instant case was reluctant to deny a stay in the absence of a ruling by this Court on a similar application and we may assume that the same reluctance will be displayed by courts in the future. The grant of a stay order herein will strengthen petitioners' contention and will increase the above-described reluctance on the part of the lower courts. The importance of the matter is emphasized by the fact that all but a few of the German alien enemies held on Ellis Island have been and are covered by this series of mass litigations. For these reasons, we strongly urge that the application for a stay be denied.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.
STANLEY M. SILVERBERG,
Special Assistant to the Attorney General.
SAMUEL D. SLADE,
Attorney.

NOVEMBER 1947.

U. S. GOVERNMENT PRINTING OFFICE: 1948

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 446

PAUL AHRENS ET AL., PETITIONERS

v.

TOM C. CLARK, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The nature of the above captioned proceeding and its position as the latest in an unsuccessful series of substantially identical litigations, as well as the legal issues raised by the petition for certiorari herein, are discussed in the memorandum which we have heretofore filed in opposition to petitioners' application for a stay and to which the Court's attention is respectfully directed. Memorandum in Opposition to Petitioners' Application for a Stay, pp. 1–6. For the reasons therein set forth, we submit that the petition for certiorari herein is without merit.

See also Respondent's Brief in Opposition pp. 3–5 in *United States* ex rel. *Kessler* v. *Watkins*, No. 414, this Term, certiorari denied on December 8, 1947.

However, we again call to the Court's attention that the heart of this proceeding does not lie in the issues raised by the petition for certiorari but in the accompanying application for a stay which petitioners seek under their interpretation of Rule 45 (1) of this Court. As shown by our memorandum in opposition to the application for a stay (pp. 6–8), this series of mass litigations covers all but a few of the German alien enemies held on Ellis Island. Lower courts have been and can be confronted with continual relitigation. In the absence of decision by this Court on the Rule 45 (1) question, petitioners' contention as to the scope of that Rule may work, and in all probability will work, a continual automatic frustration of the administration of the alien enemy program by the executive branch. As stated above, we believe the petition for certiorari to be without merit. But we strongly urge that the problem raised by petitioners' application for a stay be given independent and clear determination. Mere denial of the petition for certiorari, or denial of the petition for certiorari by order which also denies the motion for a stay, may not serve to resolve the problem which confronts lower courts.

Accordingly, we again request that petitioners' application for a stay order under Rule 45 (1) be given independent determination by this Court. And we submit that the petition for a writ of certiorari should be denied.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

H. G. MORISON,
Acting Assistant Attorney General.

STANLEY M. SILVERBERG,
Special Assistant to the Attorney General.

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JANUARY, 1948.

U. S. GOVERNMENT PRINTING OFFICE: 1948

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 446

PAUL AHRENS, ET AL.,

Petitioners

vs.

TOM C. CLARK, ATTORNEY GENERAL OF THE UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT

Opinions Below

Neither the order of the district court denying the petition for a writ of habeas corpus (R. 7-9), nor the order of the Court of Appeals dismissing the appeal (R. 23) is reported.

Jurisdiction

The Court of Appeals for the District of Columbia entered its Order Dismissing Appeal on October 30, 1947 (R. 23). The petition for a writ of certiorari was filed on November 19, 1947, and certiorari was granted on February

2, 1948 (R. 25). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

Questions Presented

1. Whether a Federal court may issue a writ of habeas corpus on the petition of one detained outside the territorial jurisdiction of the court to which the application is made, and, if so, whether the Attorney General is a proper party respondent in this proceeding.

2. Whether orders of removal issued against resident German nationals during a state of war between the United States and Germany are valid under the Alien Enemy Act of 1798, as amended, despite the "unconditional surrender" of the German Reich and the consequent Allied military control of Germany.

3. If the second question be answered in the affirmative, a further question presented is whether the Alien Enemy Act, as so applied, is constitutional.

Statute, Proclamation and Regulations Involved

The provisions of the Alien Enemy Act of 1798, R. S. 4067-4070, as amended, 40 Stat. 531, 50 U. S. C. 21-24, are set out in Appendix A, *infra*, pp. 43-45. The text of Presidential Proclamation 2655 (10 F. R. 8947) and of the Attorney General's regulations issued pursuant to the latter Proclamation are set forth in Appendices B and C, respectively, *infra*, pp. 45-47, 47-49.

Statement

Petitioners are German alien enemies presently detained at Ellis Island, New York; orders of removal have been issued against them by the Attorney General under Presi-

dential Proclamation 2655, promulgated on July 14, 1945, pursuant to the Alien Enemy Act of 1798. The removal orders are based on a finding by the Attorney General that each of the petitioners is "dangerous to the public peace and safety of the United States because he has adhered to a government with which the United States is at war or to the principles thereof." The petition for a writ of habeas corpus (R. 1-3) which instituted this proceeding was filed in the United States District Court for the District of Columbia on July 17, 1947, and was amended by leave of that court on July 23, 1947 (R. 4-6). As amended, it alleged *inter alia* that the 139 persons (of whom 129 are petitioners herein)[1] on whose behalf the writ was sought, were confined, subject to the custody and control of the Attorney General (respondent herein) on Ellis Island, New York, and were subject to, and in imminent danger of, deportation (R. 2). As to "a considerable number" of such persons, it was alleged that they were not "in fact alien enemies, as defined in the [Alien Enemy] Act * * * in that their citizenship was taken from them without due process of law and as a result of war hysteria" (R. 4). Included among other allegations equally applicable to all of the petitioners were averments that at a "perfunctory" hearing before "the Board appointed", they were denied the right of confrontation, cross-examination, the right to counsel, or the opportunity to adduce testimony on their own behalf, and that such Board was neither fair nor impartial but "had already prejudged the merits of the case" (R. 2); that it could be demonstrated to the court that such persons "have not been active members of the Nazi party or adhered to the Nazi form of government" (R. 3); that at the time when orders of removal were issued against

[1] Of the 129 listed here as petitioners, nine have been released from custody. See Appendix D, *infra*, pp. 49-52.

them, "there was neither any 'hostile nation or government' of which they were natives or citizens, nor any such entity against which the United States could any longer be at war within the purport of the Alien Enemy Act" (R. 5), and that consequently no lawful authority existed whereby such persons could be removed (R. 6).

On July 21, 1947, respondent filed a motion in the district court to dismiss the petition for a writ of habeas corpus on both jurisdictional and substantive grounds, pointing to the fact (1) that all of the petitioners therein were, and were alleged to be, without the territorial confines of the District of Columbia, and (2) that all of the issues raised by petitioners had been adversely decided against them in prior actions, including specifically a previous habeas corpus proceeding entitled *Hermann Agne et al.* v. *Tom C. Clark, Attorney General*[2] which had been dismissed in both the District and Circuit Court of Appeals for the District of Columbia (R. 6-7).[3] At the hearing on this motion, held on July 23, 1947, an oral application for a stay to prevent removal was made. On the same day, the district court entered its order dismissing the petition and denying the requested stay (R. 7-9). In the order dismissing the petition, it was determined that of the 139 persons on whose behalf the writ was sought, 99 were parties to the prior *Agne* proceeding,[4] and that, as to them, the petition "in substance and in fact" constituted a mere application for reconsideration of issues already fully litigated in that case (*Ibid.*)

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[2] Habeas Corpus No. 3132, United States District Court for the District of Columbia.

[3] The amendment of the petition for a writ of habeas corpus on July 23, 1947, referred to above, p. 3, was in an effort to meet the second ground of the motion. The matter is discussed at pp. 4-6 of our memorandum in opposition to petitioners' motion herein for a stay under Rule 45(1).

[4] Of these, some 89 are among the 129 petitioners herein.

After filing notice of appeal on July 24, 1947 (R. 10), petitioners applied to the court below for a stay order against the Attorney General in connection with removal proceedings, pending determination of the appeal. A hearing was held in chambers on this application before Stephens and Clark, J.J. At that hearing, the court below indicated unwillingness to deny the requested stay in view of the possible applicability of Rule 45(1) of the Rules of this Court. Accordingly, the application for a stay was granted, by order dated August 13, 1947, and the court below suggested that the Government file a motion to dismiss the appeal. Such a motion was filed on behalf of the Attorney General on August 15, 1947 (R. 11-15) and was sustained by the court below by *per curiam* order dated October 30, 1947 (R. 23).

Summary of Argument

I

Petitioners in this case are confined on Ellis Island which is within the jurisdiction of the District Court for the Southern District of New York. Their filing of a petition for a writ of habeas corpus in the District Court for the District of Columbia and their designation of the Attorney General as respondent raises jurisdictional and procedural difficulties which the court below held to be a bar to their suit. We believe that the Attorney General, not being the immediate physical custodian of the petitioners is not a proper party respondent; on the other hand, no specific objection was made to the designation of the Attorney General as respondent in the courts below and the Government makes no such objection in this Court. In our view, a defect of this sort can be waived.

The problem of the territorial jurisdiction of the District Court of the District of Columbia is a more difficult

one. The Government's primary concern in this respect is that no rule be established which would generally permit applicants for a writ of habeas corpus to bring their suits in a district court far removed from their place of confinement and thus require the Government, in response to a writ of habeas corpus, to transport the prisoners to such distant forum. Such transportation would involve the unwarranted expenditure of money and personnel and create a risk of escape from custody. We believe that there is no theory which justifies the institution of this suit in the District of Columbia. On the other hand, the Government is anxious to secure a final disposition of this litigation and is willing to waive, if it can, any objection to the jurisdiction of the courts below and of this Court.

II

The Alien Enemy Act of 1798 grants to the President a power to restrain or remove alien enemies "whenever there is a declared war between the United States and any foreign nation or government * * *." This Court has time and again held that a federal statute whose period of effective applicability is limited to a state of war or some other like characterization continues in effect until a formal termination of the war by a political act of either the Executive or the Congress or both. These decisions serve to dispose of petitioners' contentions that the power of removal granted to the President by the Alien Enemy Act is no longer effective because of the unconditional surrender of Germany and the subsequent control of Germany by the Allied Control Council. Nothing in the legislative history affords any ground for distinguishing this statute from the many other statutes this Court has so construed. In the Alien Enemy Act, Congress intended to, and did, give to the President a complete discretionary power to provide

for the conduct to be observed on the part of the United States toward alien enemies at any time during "a declared war." In 1920, and again in July of 1947, Congress passed legislation containing an implicit recognition of the continuance of the President's power under the Alien Enemy Act, notwithstanding the Armistice in the First World War and the unconditional surrender in this.

The judiciary cannot and should not determine for itself when the war has come to an end. That is a political problem of some delicacy with which this Court has consistently refused to deal.

To deny to the Government the power to remove alien enemies after the termination of active hostilities would be virtually to deny to the Government the power of removal. Deportations in time of active hostilities are now, as they were in 1798, virtually impossible. Moreover, it is often not in the interest of the Government to release to his native land during active hostilities an alien resident in this country who might, if removed, make a substantial contribution to the war effort of the enemy.

III

The statements of those who played a large part in the drafting of our Constitution make it perfectly clear that the war power conferred on the Federal Government by the Constitution includes a plenary power over alien enemies. This Court early recognized in *Brown* v. *United States*, 8 Cranch 110, that one of the attributes of the war power was a right of capture of the property and person of alien enemies. That plenary power was recognized by the English courts in decisions before, and roughly contemporaneous with the adoption of our Constitution, and it is also echoed in the law of nations.

Neither the unconditional surrender of Germany nor any

subsequent events detract from the plenary power of the Federal Government over alien enemies. The decisions of this Court teach that it is not the function of the judiciary to fix a date for the termination of the war. This Court has but recently recognized that a decision of the President, like that which he has here made in providing for the removal of alien enemies after the unconditional surrender, is not open to judicial inquiry, involving as it does a political prognosis in the fields of national security and foreign relations.

ARGUMENT

I

The Jurisdictional and Procedural Grounds Taken by the Court Below

The *per curiam* order dismissing petitioners' appeal to the court below (R. 23) contains citations to four cases, which, if correctly decided, compel the conclusion that neither of the courts could have properly granted the writ of habeas corpus sought by petitioners. Of the cases cited, *United States ex rel. Belardi* v. *Day*, 50 F. 2d 816 (C. C. A. 3) and *United States ex rel. Harrington* v. *Schlotfeldt*, 136 F. 2d 935 (C. C. A. 7) hold that jurisdiction to entertain *habeas corpus* proceedings vests only when the applicant for such relief is physically present within the territorial limits of the court's jurisdiction. *Jones* v. *Biddle*, 131 F. 2d 853 (C. C. A. 8), certiorari denied, 318 U. S. 784, and *Sanders* v. *Bennett*, 148 F. 2d 19 (App. D. C.), also cited by the court below, involved dismissals of petitions for writs of *habeas corpus* sought by federal prisoners against the Attorney General and the Director of the Bureau of Prisons, respectively. In the former case, although not in the latter, the application had been made to the federal district court having territorial jurisdiction over the place of confinement.

In sustaining the denials of the writ, the courts in both instances held that the appropriate respondent was the penitentiary warden and not the supervisory official named.

As stated *supra*, pp. 2-3, petitioners' application was made to the United States District Court for the District of Columbia at a time when petitioners were, and were alleged to be, interned at Ellis Island, New York. Moreover, the writ was sought against the Attorney General, although numerous other applications, made by alien enemies subject, as are petitioners, to removal orders, have named as respondents their immediate custodians.[5] In citing the decisions above discussed, it is clear, we believe, that the court below dismissed petitioners' appeal for lack of jurisdiction and because the proceeding was not brought against a proper party respondent. It is evident that if the jurisdictional and procedural decisions upon which the court below acted are here applicable, the district court could not give effect to this Court's mandate even if petitioners are correct on the merits.[6]

The Government has no desire to delay a decision on the merits of this case by requiring the habeas corpus proceeding to be commenced anew in the Southern District of New York and to wend its way here again via the Circuit Court

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[5] With respect to internees at Ellis Island, see *United States ex rel. Kurt G. W. Ludecke* v. *W. Frank Watkins, District Director of Immigration*, No. 147 Misc., this Term, certiorari denied January 12, 1948; *United States ex rel. Julius Kessler and Martha J. Kessler* v. *W. Frank Watkins, etc.*, No. 414, this Term, certiorari denied December 8, 1947. As to internees elsewhere, see the petition for a writ of certiorari in *United States ex rel. Hans Ackermann* v. *J. L. O'Rourke, Officer in Charge of Alien Internment Camp at Crystal City, Texas*, No. 584, this Term, pending.

[6] The power of this Court to issue original writs of habeas corpus in aid of its appellate jurisdiction is of course recognized, but it is extremely doubtful that the jurisdictional defects suggested by the court below call for the use of this power, ordinarily exercised only in exceptional circumstances, and not when, as here, there is an obvious forum in the New York federal district courts available to petitioners. See *Ex parte Abernathy*, 320 U. S. 219.

of Appeals for the Second Circuit. On the contrary, the Government is anxious to have the question of its right to remove petitioners authoritatively determined by this Court at the earliest possible moment, in order that it may either remove or release petitioners and not be required to retain them in its custody. To the extent that the above obstacles to the exercise of jurisdiction may be waived, the Government is now agreeable to waiving them.[7]

But the Government is concerned with the possible far-reaching effects of a decision that habeas corpus may be brought against the Attorney General in the District of Columbia by any person detained under the ultimate supervisory authority of the Attorney General. Such a holding would apply to all Federal prisoners, not merely to persons subject to removal under the Alien Enemy Act. As this Court knows, habeas corpus proceedings are customarily brought against the immediate custodian in charge of the place of detention, and the writ brings the prisoner before the nearest court. But if such persons could apply for habeas corpus against the Attorney General in the District of Columbia, it would be necessary for the Government to transport them to the District from wherever they were detained. The consequences, both from the viewpoint of expenditure of money and custodial personnel, and from that of the danger to the public from the possibility of escape, if all prisoners in Alcatraz, Atlanta and Leavenworth who file petitions for habeas corpus were required to be transported to the District of Columbia, need no elaboration.

Any rule which would permit all prisoners to file petitions—the vast majority of which, experience shows, are

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[7] In the courts below, the Government contended that the district court had no jurisdiction because the proceeding was not brought in the district in which the petitioners were detained (R. 7, 11, 12).

without merit—in the District of Columbia, and thereby to obtain free—and perhaps repeated[8]—trips to the Nation's capital, would result in serious injury to the public interest. The position we take, therefore, is that the Court should not hold that prisoners or other persons detained can, as a matter of right, institute habeas corpus proceedings outside the district in which they are detained. The Court could avoid that result:

(1) by holding that any requirement as to bringing the proceeding in the district of detention is not strictly jurisdictional, but that it is the general rule which must be followed:

(a) except in very unusual circumstances, or

(b) except when the respondent expressly waives any objection to the court's exercise of jurisdiction,

(2) by applying a doctrine in the nature of *forum non conveniens* so as to require the institution of the proceeding generally in the district of detention,

(3) by holding that as a matter of strict jurisdiction, the proceedings must be brought in the district of detention, or

(4) by holding that the named respondent must be an officer having immediate physical custody unless an objection on this ground is waived.

Recognition of a general rule requiring proceedings generally to be instituted in the district of detention on any of the above theories would conform with the practice in the past in all but a minute portion of the thousands of habeas corpus cases which have been filed.

In the light of these considerations, we turn to the questions (1) whether the Attorney General was the proper

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[8] See *Price* v. *Johnston*, No. 111, now pending.

respondent and (2) whether the suit may be brought outside the district in which the petitioners are detained.

1. There is little room for doubt that an officer who, like the Attorney General in these proceedings, can in no sense be thought to have "actual physical custody" of the petitioners, is not properly named as respondent in a petition for a writ of habeas corpus. *Jones* v. *Biddle*, 131 F. 2d 853 (C. C. A. 8), certiorari denied, 318 U. S. 784; *Sanders* v. *Bennett*, 148 F. 2d 19 (App. D. C.); cf. *McGowan* v. *Moody*, 22 App. D. C. 148, 163. See *Wales* v. *Whitney*, 114 U. S. 564, 574, in which this Court stated that the acts of Congress concerning the writ of habeas corpus "contemplate a proceeding against some person who has the immediate custody of the party detained, with the power to produce the body of such party before the court or judge, that he may be liberated if no sufficient reason is shown to the contrary." Although this seems to be the general rule, there are cases which hold that in the absence of any objection by the Government and when the Government has resisted the issuance of the writ on the merits, a "cause exists in that state of the proceedings and an appeal lies from denial of a writ." *Ex parte Endo*, 323 U. S. 283, 305, citing *Ex parte Milligan*, 4 Wall. 2, 112; *Ex parte Quirin*, 317 U. S. 1, 24. Although this Court has not explicitly so stated, the rationale of the group of cases last cited would seem to be that the United States cannot, after failing to make objection to the lack of a proper respondent which has the effect of causing the petitioner to decide not to commence a new action against a proper respondent, then change its position on a subsequent appeal. In this case, the Government made no specific objection in the courts below to the designation of the Attorney General (R. 7, 11, 12). We see no reason why the United States cannot waive this particular objection since it has the effect merely of per-

mitting suit against one Government officer rather than another. Accordingly, we think that this case comes within the exception recognized in the *Endo* decision, and that the petition should not have been dismissed on that ground.

2. The question of the jurisdiction of the district court over a petition for *habeas corpus* filed by applicants not within the territorial confines of the district is more difficult. In the Brief for the United States in the *Endo* case, No. 70, October term, 1944, this issue was fully canvassed. And the opinion of this Court in the *Endo* case sets out virtually all of the materials relevant to this jurisdictional issue.[9] Because the applicant for habeas corpus was confined within the district when her petition for habeas corpus was filed, and had only subsequently been moved, this Court found it unnecessary in that case to resolve the more general problem, holding that jurisdiction over a respondent was, in that situation, enough. In this case, however, we think that there is no escape from the resolution of the territorial jurisdiction issue unless it be on the ground that there is no proper party respondent in the District of Columbia.

The conclusion of the Government's analysis of the relevant authorities in the *Endo* brief (p. 53) was that "It seems to be fairly certain that a court will rarely entertain a habeas corpus proceeding to challenge the detention of a petitioner beyond its territorial jurisdiction; but there are cases in which it has been done, usually because of circumstances which caused the actual controversy to relate to matters arising within the jurisdiction." In this case we can perceive of no special circumstances which point toward a conclusion that the district court did have jurisdiction.

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[9] See, in addition, *Ex parte Yee Hick Ho*, 33 F. 2d 360 (N. D. Cal.); cf. *In re Bickley*, 3 Fed. Cas. No. 1387 (S. D. N. Y.); *Ex parte O'Brien* [1923], 2 K. B. 361.

Indeed this case, involving 139 petitioners as it did, dramatizes the possible undesirability of a contrary conclusion. Issuance of the writ, absent a stipulation to the contrary, would have required the transportation of all the petitioners from New York to the District of Columbia (28 U. S. C. 458) with concomitant expense and utilization of custodial personnel. The requirement would not be otherwise were these persons confined in San Francisco, nor would the situation be different were the petitioners ordinary inmates of Federal penitentiaries rather than alien enemies. Nor is there any reason why it would be more difficult or less convenient for the case to be heard in the Southern District of New York than in the District of Columbia.

Accordingly, we submit that, apart from the Government's present willingness to waive the objection for purposes of this case only, there is no basis for reversing the courts below with respect to this jurisdictional ground for decision.

We shall proceed, in the remainder of this brief, on the assumption that the courts below had power to pass upon the merits of petitioners' contentions. We do so because we believe that if this Court should decide that there is jurisdiction over this cause there is no occasion for a remand to either of the courts below for consideration of the case on its merits since they have but recently upheld the power of the Attorney General on the merits in the face of identical contentions. See *Citizens' Protective League, et al.* v. *Clark*, 155 F. 2d 290 (App. D. C.), certiorari denied, 329 U. S. 787.

II

The Alien Enemy Act of July 6, 1798, as amended on April 16, 1918, Authorizes the Removal of the Petitioners

President Truman's Proclamation No. 2655 (Appendix B, *infra*, pp. 45-47), issued on July 14, 1945, grants to the At-

torney General the power to remove from the United States all alien enemies interned within the United States, "who shall be deemed by the Attorney General to be dangerous to the public peace and safety of the United States because they have adhered to the [Governments of Japan, Germany, Italy, Bulgaria, Hungary, or Rumania] or to the principles of government thereof". It is the position of the Attorney General that the President's authority to issue this Proclamation and the Attorney General's power to effectuate it with reference to the German nationals here involved, is unassailable. Not only does the plain language of the Alien Enemy Act grant the power here exercised, but that power has been consistently recognized and acknowledged by the courts for almost a century and a half.

Section 21 of the Alien Enemy Act [10] prescribes two alternative sets of conditions upon the fulfillment of which the powers granted the President of the United States may be exercised. If (1) there is a declared war between the United States and any foreign nation or government and the President makes public proclamation of the event, or (2) any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States by any foreign nation or government, and the President publicly proclaims that event, the President is au-

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[10] For convenience, the sections of the Alien Enemy Act will, throughout this brief, be numbered as they are in Title 50 of the United States Code

The provisions of this Act are set out in Appendix A, *infra*, pp. 43-45. Originally enacted by the Fifth Congress on July 6, 1798 (1 Stat. 577; R. S. 4067-4070), the first section of the Act was amended on April 16, 1918, so that it would apply to female enemy aliens as well as males. 40 Stat. 531.

The Alien Enemy Act should not be confused with what are commonly referred to as the alien and sedition laws, applicable to friendly aliens, which were enacted on June 25, 1798 (1 Stat. 570) and July 14, 1798 (1 Stat. 596); these laws, by their own terms, were to be in effect for only two years.

thorized, *inter alia*, to direct the manner and degree of the restraint to which enemy aliens shall be subject, and to provide for the removal of enemy aliens. We shall show that the first set of conditions has been met and that the Attorney General, in the exercise of the powers granted him by the President, had the power to issue, and now has the power to effectuate, the orders of removal against the petitioners, German "natives, citizens, denizens, or subjects".[11]

There is a declared war between the United States and the German Government, and neither the unconditional surrender of Germany nor any subsequent events have rendered the Alien Enemy Act inoperative.—On December 11, 1941, a joint resolution declaring the existence of a state of war between the United States and the Government of Germany was passed by Congress and approved by the President. 55 Stat. 796. In his Proclamation No. 2655 (Appendix B, *infra*, p. 46), the President of the United States publicly proclaimed that event. Unless the unconditional surrender of the German Government or the allied military control of Germany can be said to have terminated the state of war so declared and proclaimed, there is no doubt that the President had the authority, exercised on July 14, 1945, to provide for the removal of German aliens who were dangerous to the public peace and safety because they had adhered to the German Government or the princi-

[11] In their petition for a writ of certiorari (p. 4), petitioners state, as their second question presented, that "A considerable number of the petitioners are not alien enemies and hence could not be removed." We are at a loss to understand what this statement is intended to convey unless it be simply another way of stating their basic contention that there is no longer a war and, hence, no such status as enemy alienage. 114 of the petitioners are German nationals, resident in this country, who have never been naturalized. The remainder were granted citizenship, but were subsequently denaturalized. No attack is here made on the validity of the denaturalization proceedings, and we shall, therefore, assume that there is no such question in this case.

ples thereof, and that the Attorney General has and had the power to remove the petitioners.

The petition for a writ of certiorari does not make entirely clear the nature of the petitioners' contention in this respect. At one point, the petition asserts that "When the orders of removal were issued there was no longer a war * * *;" at another point, petitioners ask this Court to "determine the question as to whether the war is now at an end and whether the proclamation by the President of the United States is now binding." (Pet. 4.) We believe that whether the crucial date be the date of the original orders of removal [12] or the present is a question the answer to which is of no consequence in determining the continued applicability of the Alien Enemy Act and of little or none in determining the constitutionality of the Act as here applied.[13] If this difference in dates be deemed to have any significance, it is important to bear in mind that the delay in the execution of the orders of removal is attributable almost entirely to the overlapping series of related litigations which petitioners have brought against the Attorney General for the purpose of preventing their removal.[14]

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[12] These are set out in Appendix D, *infra*, pp. 49-52.

[13] The constitutional question is discussed in point III of this brief.

[14] See memorandum for the respondent filed with this Court in answer to petitioners' motion for a stay under Rule 45(1) of the Rules of this Court. This memorandum was submitted in mimeographed form; for the convenience of the Court, we have had this memorandum printed, and printed copies have been filed with the Clerk of the Court. We wish to add but one thought to what is stated in that memorandum: We believe that the purpose of Rule 45 (1) is to prevent a court from disturbing the custody of the applicant for a writ of habeas corpus pending the appeal from a denial of the writ when nothing more substantial with reference to the merits than a petition previously adjudged invalid has been filed. We do not believe that Rule 45(1) was designed to stay the hand of the Executive Branch with reference to the applicant. *In re McKane*, 61 Fed. 205 (C. C. S. D. N. Y.); but *cf. Ex parte Colonsaro*, 138 F. 2d 100 (C. C. A. 3). Rule 45 (2), which governs appeals from orders discharging

This Court has consistently held that a federal statute, the applicability of which is limited, by one form of words or another, to a state of war, does not cease to be operative until the state of war has been terminated by treaty, act of Congress, or executive proclamation. *United States* v. *Anderson*, 9 Wall. 56; *The Protector*, 12 Wall. 700; *McElrath* v. *United States*, 102 U. S. 426; *J. Ribas y. Hijo* v. *United States*, 194 U. S. 315; *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146; *Kahn* v. *Anderson*, 255 U. S. 1; cf. Mathews, *The Termination of War* (1921) 19 Mich. L. Rev. 819, 820. In each of the cited cases, presenting the same question of statutory interpretation in a variety of circumstances, this Court has found that Congressional use of words which measured the duration of a granted power by "war" or "peace" evidenced a Congressional purpose that the power would terminate on a date definitely fixed by appropriate executive or legislative action. Suggestions that the termination of war, for the purpose of measuring the availability of a statutory power or privilege, was a matter to be determined by judicial declaration or private judgment have at all times been rejected. See, e.g., *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. at 167; *United States* v. *Anderson*, 9 Wall. at 70; *Commercial Trust Co.* v. *Miller*, 262 U. S. 51. See *infra*, pp. 26-32.

But the petitioners seek to avoid these decisions on two grounds. The first, which may be shortly disposed of, is

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writs of *habeas corpus*, by contrast provides that pending an appeal, the prisoner may be remanded to custody or enlarged upon recognizance as the court rendering the decision may determine.

Since there is no indication that petitioners will desist from repeating their pattern of delay, the problem of judicial administration raised by the alleged conflict between rule of court and statutory executive power presently pending before this Court in connection with petitioners' motion for a stay under Rule 45 (1), continues to be of great importance. The problem would reach its most acute point if petitioners continue their litigations until a formal treaty of peace terminates the state of war.

that "not later than October 29, 1945, the political branch of the United States Government had ended the war with Germany" (Pet. 19).[14] But the fact is that on December 31, 1946, long after the issuance of the removal orders here challenged, the President, in proclaiming a "cessation of hostilities," plainly announced that "a state of war still exists." 12 F. R. 1. Cf. *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. at 167-168, in which this Court held that the War-Time Prohibition Act, operative "until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States," did not cease to be in effect by reason of the President's statement, in announcing the armistice, that "The war thus comes to an end" or of his mention, in a veto message, of the "demobilization of the army and navy."

The petitioners' alternative argument is that the Alien Enemy Act, unlike other Federal statutes the effective duration of which is "time of war" or like terms, was intended to be applicable only during "war in fact" or "actual hostilities" (Pet. 11). But "While one may not end with the words of a disputed statute, one certainly begins there" (*Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349, 350), and there is nothing in the text of the Alien Enemy Act to suggest that despite the absence of legislative or executive action affecting, in any way, the declaration of a state of war between the United States and Germany, the power conferred on the President has terminated. On the

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[14] Petitioners fix October 29, 1945, as the date of termination of war by reference to a proclamation allegedly issued on that date by the Allied Control Council for Germany (Pet. 17-19). That date would seem to be erroneous. For an official list of the dates of the various documents and proclamations dealing with the military capitulation of Germany and the ensuing establishment of allied military control, see *The Axis in Defeat*, Department of state Publication 2423.

contrary, Presidential Proclamation No. 2655 and the orders of removal issued pursuant to the proclamation were and are "within the precise terms of the statute." *Citizens' Protective League* v. *Clark*, 155 F. 2d 290, 295 (App. D. C.), certiorari denied, 329 U. S. 787; *United States ex rel. Kessler* v. *Watkins*, 163 F. 2d 140 (C. C. A. 2), certiorari denied, No. 414, this Term; *United States ex rel. Hack* v. *Clark*, 159 F. 2d 552 (C. C. A. 7).

A study of the legislative history, moreover, reveals no Congressional purpose other than that implicit in the words of the statute: a purpose to vest in the President a summary power over enemy aliens while there is "a declared war" so that such persons may be prevented from sowing discord and dissension and taking overt action inimical to the public peace and safety. Those excerpts from the legislative debates upon which petitioners rely have a dual significance, neither of any aid to petitioners. See Pet. 11-14. They show, first, a Congressional purpose to grant to the President the powers conferred by the Act not only during a declared war but also in case of war without a declaration, or, as the Act puts it, when "any invasion or predatory incursion is perpetrated, attempted or threatened." See Appendix A, *infra*, p. 43.[16] They strongly indicate, secondly, as does the entire legislative history of the statute, a firm intention by Congress to confer upon the President a broad and summary power over alien enemies to the fullest

[16] Petitioners' further argument (Pet. 11-12), if we understand it, that the provisions of Sec. 9, Art. 1, of the Constitution led Congress to refer to "a declared war" when it actually meant something less would appear unfounded. Gallatin's suggestion that this section might in some degree limit the power of Congress over alien enemies was vigorously refuted in the debates, it being pointed ou, as has since been judicially declared (*People* v. *Compagnie Generale Transatlantique*, 107 U. S. 59, 62), that the provisions dealt with Africans exclusively. See Annals of Congress, 5th Cong., 2d sess., pp. 1991, 1993. Cf. *United States ex rel. Kessler* v. *Watkins*, *supra*, at 142.

extent necessary in his judgment. Annals of Congress, 5th Cong., 2d sess., pp. 1574, 1575, 1576, 1577, 1581, 1582, 1790, 1980, 1983-93.[17] See *United States ex rel. Kessler* v. *Watkins*, 163 F. 2d at 142-143 (C. C. A. 2), certiorari denied, No. 414, this Term.

Although during the First World War, cases arising under the Alien Enemy Act were heard and decided after the armistice, the reports contain no intimation of any thought, on the part of either counsel or court, that the Armistice was of any significance whatever. See *Ex parte Risse*, 257 Fed. 102 (S. D. N. Y.); *Ex parte Gilroy*, 257 Fed. 110 (S. D. N. Y.); *Banning* v. *Penrose*, 255 Fed. 159 (N. D. Ga.). Indeed, Congress, in 1920, recognized the continued effectiveness of the powers conferred on the President by the Alien Enemy Act of 1798. Although the armistice with Germany had been entered into almost two years before, Congress, on May 10, 1920, provided for the deportation of various groups of aliens, the first among which was aliens then "interned under section 4067 of the Revised Statutes of the United States [Section 21 of the Alien Enemy Act] and the proclamations issued by the President in pursuance of said section." 41 Stat. 593.[18] That this was a distinct recognition of the continued applicability of all the provisions of the Alien Enemy Act after the armistice, becomes clear when it is noted that that Act permits of no differentiation between the power to intern and the power to remove. In passing the Act of

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[17] Some of these references to the Annals of Congress are not references to the debates on the Alien Enemy Act as such but to a discussion of a resolution recommending legislative provisions substantially identical with those that became the Alien Enemy Act. See Annals of Congress, 5th Cong., 2d sess., pp. 1566-1567.

[18] This statute is set forth in pertinent part in the petition for certiorari at pp. 9-10. It has been dropped from the United States Code as obsolete. 8 U. S. C. 157.

May 10, 1920, Congress knew that from 500 to 700 enemy aliens were still interned (H. Rep. No. 143, 66th Cong., 1st sess.; S. Rep. No. 283, 66th Cong., 1st sess.) and reaffirmed the authority which had been conferred on the President to restrain or remove alien enemies while there was a "declared war." Similarly, Congress has recognized the continuation of the power after the unconditional surrender of Germany in World War II by appropriating funds for "* * * all necessary expenses, incident to the maintenance, care, detention, surveillance, parole, and transportation of alien enemies and their wives and dependent children, including transportation and other expenses in the return of such persons to place of bona fide residence or to such other place as may be authorized by the Attorney General * * *." Public Law 166, 80th Cong., 1st sess., at p. 16.

The congressional reaffirmation in 1920, and again in July of 1947, of the President's power over alien enemies, compels the conclusion that that power rests in the President today. Petitioners' reliance (Pet. 8-9) on a joint letter, dated February 5, 1919, sent to the chairman of the House Committee on Immigration and Naturalization by Attorney General Gregory and the Secretary of Labor is, we believe, misplaced. The letter is set forth in Hearings, House Committee on Immigration and Naturalization, H. R. 6750, 66th Cong., 1st sess., p. 42. Similar letters were written by Attorney General Gregory on January 9, 1919 (H. Rep. 1000, 65th Cong., 3d sess., p. 2), and by Attorney General Palmer on May 27, 1919 and August 13, 1919. H. Rep. 143, 66th Cong., 1st sess., p. 2; S. Rep. 283, 66th Cong., 1st sess., p. 2. The letters were written to urge the enactment of legislation providing for the permanent expulsion of interned alien enemies as well as of other aliens who

had been convicted of any of a group of wartime crimes. The pertinent portion of these letters are as follows:

January 9, 1919.

* * * * * * * *

The authority given by the President to regulate the conduct of enemy aliens during the existence of the war, in my opinion, could not properly be used at this time to bring about the deportation of these aliens. There is now, therefore, no law under which these persons can be expelled from the country * * *. [H. Rep. No. 1000, 65th Cong., 3d sess., p. 2.]

February 5, 1919.

* * * * * * * *

There is no law now on the statute books under which these persons can be excluded from the country, nor under which they can be detained in custody after the ratification of the peace treaty. Unless the bill introduced by you, or one similar in character is passed, it will become necessary on the ratification of peace to set free all of these highly dangerous persons. [Hearings, House Committee on Immigration and Naturalization, H. R. 6750, 66th Cong., 1st sess., p. 42.]

May 27, 1919.

* * * * * * * *

In the present state of the law there is no way in which these dangerous interned alien enemies can be deported. Unless Congress takes some action to provide for their deportation under suitable restrictions as to hearings, procedure, etc., they will be turned loose upon the country as soon as a treaty of peace is ratified. [H. Rep. No. 143, 66th Cong., 1st sess., p. 2.]

August 13, 1919.

* * * * * * * *

> There is no law now on the statute books under which these persons can be excluded from the country, nor under which they can be detained in custody after the ratification of the treaty of peace. Unless H. R. 6750, or a bill similar in character, is passed, it will become necessary, on the ratification of the treaty of peace, to set free all of these dangerous individuals. [S. Rep. No. 283, 66th Cong., 1st sess., p. 2.]

A reading of these letters leaves one uninformed as to the reasons for the conclusions that new legislation was essential. Certainly there is nothing in the letters which even suggests that the armistice was thought to limit the power of removal granted by Section 21. Indeed, no reference is made to the Alien Enemy Act in this connection. We are left entirely at large as to the basic reasons, legal or political, which prompted the view expressed in these letters.

We may, of course, speculate. Conceivably, these requests for the enactment of a new statute were prompted by the refusal or failure of the President to issue a proclamation under the Alien Enemy Act which would provide, in such sweeping terms, for the deportation of interned alien enemies—"a choice of remedies rather than a waiver of protection."[19] See *Ex parte Kawato*, 317 U. S. 69, 78,

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[19] Upon the entry of the United States into World War I, President Wilson, in his Proclamation of April 6, 1917 (40 Stat. (Part 2) 1650) quoted Section 1 of the Alien Enemy Act, recited the existence of a state of war, and prescribed the conduct to be observed toward and by German alien enemies. Among the regulations established by the Proclamation were those forbidding the possession of arms or signalling devices, the publication of attacks against the Government, residing in any area prohibited to alien enemies, departing from the United States except under a Presidential permit or court order, etc. Regulation 8 of the Proclamation provided that

> An alien enemy whom the President shall have reasonable cause to believe to be aiding or about to aid the enemy, or to be at large to the danger of the public peace or safety of the United States, or to have violated or to be about to violate any of these regulations, shall re-

note 14. It is possible that the President and his cabinet officers desired to shift to Congress the burden of determining the deportation policy, or that the Secretary of Labor and the Attorneys General were primarily interested in those provisions of the 1920 Act which, being applicable to non-enemy aliens, were not covered by the Alien Enemy Act. Or it may be that since the signature and ratification of the Versailles Treaty were thought to be imminent (see Hudson, *The Duration of the War Between the United States and Germany* (1926), 39 Harv. L. Rev. 1020, 1031), the Attorneys General and the Secretary of Labor thought that additional legislation would be necessary only because the deportations might occur subsequent to ratification. *Cf. United States ex rel. Kessler* v. *Watkins, supra,* 163 F. 2d at 143.

If any of these reasons motivated the letters of the Secretary of Labor and the Attorneys General, their views have no bearing on the problem before this Court. If, despite any indication that consideration was given to the powers vested in the President by the Alien Enemy Act, the letters are read to reflect the view that after the armistice there was no power to remove, we can only suggest that such a conclusion was contrary to the great weight of authority, then as now (see *supra,* pp. 18, 19-21), and that the view of

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move to any location designated by the President by Executive Order, and shall not remove therefrom without a permit, or shall depart from the United States if so required by the President. [40 Stat. (Part 2) 1652].

The Presidential Proclamation of December 23, 1918 (40 Stat. (Part 2) 1918) abrogated Regulation 8 and most of the other regulations contained in the Proclamation of April 6, 1917. Therefore, at the time of the passage of the deportation statute of 1920 and the consideration of the bills which eventually resulted in the passage of that act, the regulation which had provided for removal of alien enemies was no longer in existence. Until Christmas Day, 1918, Regulation 8 of the Proclamation of April 6, 1917, was in effect, but carried a much narrower removal power than that sought by the Attorneys General and the Secretary of Labor.

the present Attorney General, charged with the enforcement of the removal provisions of the Alien Enemy Act, is entitled to at least as much weight as the opinions of those who were not charged with that duty. *Cf. Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 315. In any event, the words of the statute are so clear that resort to administrative construction is needless, and, even if the statute were less clear, an ambiguous administrative construction could afford no aid. *Cf. Burnet* v. *Chicago Portrait Co.*, 285 U. S. 1, 16; *Estate of Sanford* v. *Commissioner*, 308 U. S. 39, 49.

Accordingly, we submit that, as a matter of pure statutory construction, there can be no doubt that Congress intended that the power granted the President under the Alien Enemy Act would remain available for his discretionary exercise until the termination of the state of war by treaty or by unilateral legislative or executive action. We see no need for argument to illustrate that the aftermath of the actual hostilities of World War II exceeds in delicacy, complexity, and duration, any situation that has ever faced any of the nations of the world in the past. And consideration of the actual complexity involved in "termination of war," lies at the core of the view, repeatedly expressed by this Court, that the termination date be fixed by "* * * some public act of the political departments of the government * * *." *The Protector*, 12 Wall. at 701-702; *United States* v. *Anderson*, 9 Wall. at 70. In *Commercial Trust Co.* v. *Miller*, 262 U. S. at 57, this Court specifically stated that:

> A court cannot estimate the effects of a great war and pronounce their termination at a particular moment of time, and that its consequences are so far swallowed up that legislation addressed to its emergency had ceased to have purpose or operation with the cessation of the conflicts in the field. Many problems would yet remain for consideration and solution, and such was the judgment of Congress * * *.

See also *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146, 167. The legislative history of the Alien Enemy Act itself underscores the purpose of Congress to commit to the President, and to him alone, within certain broad limits, the authority to decide when and how to exercise the power granted to him. For example, Mr. Sewall's remarks (Annals of Congress, 5th Cong., 2d Sess., p. 1790) are pertinent:

> The intention of this bill is to give the President the power of adjudging what is proper to be done, and to limit his authority in the way proposed by this bill. In many cases, it would be unnecessary to remove or restrict aliens of this description; and he believed it impossible for Congress to describe the cases in which aliens or citizens ought to be punished, or not; but the President would be able to determine this matter by his proclamation.

And in one of the first cases to be decided under the Alien Enemy Act, *Lockington's Case*, Brightly (Pa.) 269, 280, Chief Justice William Tilghman pointed out that

> The president, being best acquainted with the danger to be apprehended, is best able to judge of the emergency which might render such measures necessary. Accordingly, we find that the powers vested in him are expressed in the most comprehensive terms. He is to make any regulations which he may think necessary for the public safety, so far as concerns the treatment of alien enemies. It is certain, that these powers create a most extensive influence, which is subject to great abuse; but that was a matter for the consideration of those who made the law, and must have no weight with the judge who expounds it. The truth is, that, among the many evils of war, it is not the least, to a people who wish to preserve their freedom, that, from necessity, the hands of the executive power must be made strong, or the safety of the nation will be endangered.

The wisdom of this judicial deference to executive or legislative decision as to the termination of war for various

purposes can be specifically illustrated by a realistic consideration of the situation covered by the Alien Enemy Act. First, we believe that a denial of the power to deport alien enemies during "declared war" but after armistice or unconditional surrender would be virtually tantamount to a denial of any power to deport alien enemies. This was clearly the case in the situation which existed at the time that the Alien Enemy Act was passed by the Fifth Congress. Embargoes on United States shipping were a well known feature of that period, [20] and this country's weakness as a maritime power, and the impossibility of landing persons on a hostile shore during hostilities were presumably well known.[21] That the physical difficulties and dangers of deportation during active hostilities have not been dissipated by our growth in military strength can be graphically

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[20] Only one month prior to the passage of the Act, United States ships had been barred from French ports (Act of June 13, 1798, 1 Stat. 565). Earlier, in 1794, a thirty-day embargo forbade United States ships from leaving foreign ports (Joint Resolution, March 26, 1794, 3d Cong., 1st Sess., 1 Stat. 400). The Act of June 4, 1794, empowered the President to lay embargoes "whenever, in his opinion, the public safety shall so require" (1 Stat. 372; see 3 *The American Secretaries of State and Their Diplomacy* (1927), p. 132.

Embargoes were again enacted on December 22, 1807 (2 Stat. 451) and April 4, 1812 (2 Stat. 700). See also Acts of January 9, 1808 (2 Stat. 453), March 12, 1808 (2 Stat. 473), April 25, 1808 (2 Stat. 499), and January 9, 1809 (2 Stat. 506), supplementing the Embargo Act of 1807.

[21] The United States felt itself unable, in 1788, to compel the release by the Barbary Pirates of twenty-two United States citizens enslaved in the Pirate ports. It was not until after the close of the War of 1812 that this Government finally compelled the Pirate Powers to sign treaties forever renouncing their rights to tribute from the United States. Hockett, *Political and social growth of the United States 1492-1852* (1937), 365; 3 *Encyclopedia Americana* (1944), 233; Wright and MacLeod, *The First Americans in North Africa* (1945).

The Department of the Navy was created by the Act of April 30, 1798 (1 Stat. 553).

Physical deportation of alien enemies to their native lands was as difficult during the actual hostilities of the Revolutionary War and the War of 1812 as during the "Naval War of 1797" between this country and France.

illustrated by reference to the danger to alien enemies themselves involved in such a program. As recently as March 13, 1941, the then Attorney General, Robert H. Jackson, wrote the Chairman of the House Committee on the Judicary to point out that world conditions were such that "we must cease to rely solely upon deportation as a protection of our society against undesirable aliens and must adopt a realistic policy based upon the impracticability of deportation." His letter states (Hearings, Subcommittee No. 2 of the H. Committee on the Judiciary, H. R. 3, 77th Cong., 1st sess., p. 8):

> Because of existing war conditions there are no sailings to any European country except the British Isles, Portugal, and Spain. At least, as to England and Ireland, a grave question arises whether the extraordinary dangers of the high seas do not make deportation a sort of contingent sentence of death. In spite of misgivings on the subject, on December 23, 1940, it was decided to proceed with the deportation of seven British and three Dutch subjects. They left Philadelphia on the Dutch Steamship *Soemba*. This ship went down off Nova Scotia on January 5, and seven of the deportees perished.

A further, and more terrible illustration of this danger, can be shown by the sinking of the British *Arondora Star* on July 2, 1941, while transporting 1,500 German and Italian internees to overseas custody.

Aside from the virtual impossibility of forcibly unloading on the shores of a powerful foe its subjects whose residence this country deems dangerous, there is the additional consideration that even where such power exists, the national interest does not permit the dissipation of naval resources in such militarily useless activities. The only tolerable alternative is to wait until hostilities have reached such a state that such transfers can be made without bloodshed and without straining overtaxed maritime facilities.

Second, and quite apart from the difficulty attending deportations during actual hostilities, consideration should be given to the fact that alien enemies deported during such hostilities might carry with them information or skills which the enemy power would use to our detriment. See 3 Hyde, *International Law* (1945), p. 1721. This point was explicitly recognized by the courts in connection with the administration of the Alien Enemy Act during the War of 1812. In *Lockington's* case, Brightly (Pa.) 269, 277-278, Chief Justice Tilghman said:

> I do not consider, as has been contended by Mr. Lockington's counsel, that the apprehending, restraining and securing, here mentioned, are to be intended solely for the purpose of removal out of the United States. It is a provision for the public safety; which may require that the alien should not be removed, but kept in the country under proper restraints . . .

Similarly, in *Lockington* v. *Smith*, 15 Fed. Cas. No. 8,448, p. 760 (C. C. D. Pa.), Mr. Justice Washington recognized that the interests of national defense might require that certain alien enemies not be permitted to leave the United States during hostilities. Referring to the argument that the Act authorized restraint only if the alien enemy was to be removed from the United States, Justice Washington said:

> If this be the true construction of the act, it would follow that, however dangerous it might be, under any supposed circumstances, for alien enemies to quit the United States, possessed of information useful to the enemy, and detrimental to this nation, they must nevertheless be either sent away, or be suffered to go at large, protected spies in the service of the enemy, and possibly in the vicinity of their armies and navy. . . . It seems perfectly clear, that the power to remove was vested in the president, because, under certain circumstances, he might deem that measure most effectual to

guard the public safety. But he might also cause the alien to be restrained or confined, if in his opinion the public good should forbid his removal.

Third, the continuation of the Presidential power over alien enemies beyond the termination of actual combat provides an occasion for reconsideration by the President of the need for removing interned alien enemies from the country. There is some possibility that actual combat might, prior to its termination, dwindle sufficiently to permit the mass removal of interned alien enemies, a step which might be considered necessary if the Presidential power to remove were deemed to lapse with the termination of actual fighting. Under the construction which we believe must be placed upon this statute an opportunity is afforded for the reconsideration of the case of each alien enemy on further hearing, and the President or his delegate might well, on the facts of an individual case, determine that actual removal had become unnecessary. This reconsideration in connection with the issuance of removal orders has, in fact, been carried out under Proclamation 2655 and a substantial number of interned alien enemies have been released.

Finally, reference should be made to petitioners' contention that the Presidential power to remove them under the Alien Enemy Act has lapsed "* * * inasmuch as there is no existing government of Germany * * *" (R. 6). This contention apparently means that the collapse of the Hitler regime automatically terminated the President's power under the Alien Enemy Act. But it is sufficient to state, as did the Circuit Court of Appeals for the Second Circuit, that "though the government changes, the nation remains, with rights and obligations unimpaired." *United States ex rel. Kessler* v. *Watkins*, 163 F. 2d 140, 143 (C. C. A. 2), certiorari denied, No. 414, this Term. And in *Clark* v. *Allen*, 331 U. S. 503, 514, this Court rejected the

argument that a treaty with Germany could no longer be deemed in effect because Germany "has ceased to exist as an independent national or international community." Surely, if there is a sufficient governmental entity in Germany to permit of the continuance of a treaty to which the German government is a party, there is a sufficient governmental entity in Germany to permit of a continuance of a state of war with that nation. The political branches of our government and of the other allied governments plainly contemplate the ultimate negotiation of a treaty of peace with Germany. If petitioners' argument in this respect were to be accepted, all of those powers of government which depend upon the existence of a state of war would terminate simply because the Hitler regime has collapsed and despite the fact that problems of great magnitude remain to be solved before the restoration of peace. Cf. Note, *Judicial Determination of the End of the War* (1947), 47 Col. L. Rev. 255, 257.

III

The Alien Enemy Act, as Applied in This Case, Is Constitutional

Having come into being as a wartime statute applicable only to alien enemies in time of war or threatened war, the Alien Enemy Act must be assessed, for constitutional purposes, by measuring the power exercised against the war powers conferred by the Constitution. The task of making that assessment is less difficult than in the usual constitutional case: there is no problem of applying necessarily broad language in the Constitution to a situation which could not have been foreseen by its draftsmen; the problem of alien enemies was not new in 1789, and there have come down to us statements of the Founding Fathers in which explicit recognition is given to the power over alien enemies

as an attribute of the war power. The task of constitutional judgment is made easier too by the fact that the very legislation with which we are concerned was enacted by an early Congress—the Fifth—whose membership included many of the men who had participated in the drafting and adoption of the Federal Constitution.

The broad war power of the National Government was early recognized as including a summary power of "capture" over enemy aliens. In his report on the Virginia Resolutions, Madison distinguished between the Alien Enemy Act and the alien and sedition laws (see *supra*, note 1), and said that (4 Elliott's Deb. 554)

> much confusion and fallacy have been thrown into the question, by blending the two cases of *aliens, members of a hostile nation; and aliens, members of friendly nations.* These two cases are so obviously and so essentially distinct, that it occasions no little surprise that the distinction should have been disregarded; and the surprise is so much the greater, as it appears that the two cases are actually distinguished by two separate acts of Congress, passed at the same session, and comprised in the same publication; the one providing for the case of "alien enemies;" the other "concerning aliens" indiscriminately, and consequently extending to aliens of every nation in peace and amity with the United States. With respect to alien enemies, no doubt has been intimated as to the federal authority over them; the Constitution having expressly delegated to Congress the power to declare war against any nation, and of course to treat it and all its members as enemies.

This statement as to the plenary power of the Federal Government over enemy aliens reflected a view from which there was little dissent on the part of the early statesmen of the Republic. Thus Mr. Gallatin, who vigorously opposed the alien and sedition laws (Annals of Congress, 5th Cong.,

2d Sess., pp. 1980-1983), made it clear that he distinguished between the rights of alien friends and alien enemies—

> although Congress has not the power to remove alien friends, it cannot be inferred, as had been objected, that it had not the power to remove alien enemies; this last authority resulted from the power to make all laws necessary to carry into effect one of the specific powers given by the Constitution. Among these powers is that of declaring war, which includes that of making prisoners of war, and of making regulations with respect to alien enemies, who are liable to be treated as prisoners of war. By virtue of that power, and in order to carry it into effect, Congress could dispose of the persons and property of alien enemies as it thinks fit, provided it be according to the laws of nations and to treaties.

The plenary power to dispose of the persons and property of alien enemies was not one peculiar to the United States of America. The consistent pronouncements of the English courts in decisions roughly contemporaneous with the adoption of our Constitution and the enactment of the Alien Enemy Act reflected a recognition of at least as sweeping a power over alien enemies.[22] The law of nations too viewed enemy alienage as a status involving rights extremely limited in nature.[23]

It is not surprising then that Chief Justice Marshall's language in *Brown* v. *United States*, 8 Cranch 110, 122-123,

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[22] See, *e. g.*, *Sylvester's Case* (1702), 7 Mod. 150; 1 Blackstone, *Commentaries*, 371-372; 1 *Halsbury's Laws of England* (1907), Section 682, p. 310; *Cro. Eliz.* 142; *The Case of Three Spanish Sailors* (1779), 2 W. Blackstone 1324; *King* v. *Depardo* (1807), 1 Taunton 25. See also, discussion of the rights and privileges of alien enemies at common law in *Porter* v. *Freudenberg*, 1 L. R. [1915], K. B. D. 857, 865 *et seq.*, and in *The King* v. *Superintendent of Vine St. Police Station (Ex parte Liebmann)*, 1 L. R. [1916], K. B. D. 268, 278; cf. this Court's opinion in *Ex parte Kawato*, 317 U. S. 69, 72-73.

[23] See Dana, *Wheaton's International Law* (1866) sec. 304 and note; Halleck, *International Law* (1861), p. 360; Woolsey, *International Law* (1867), sec. 178.

leaves little room for doubt as to the validity of the Alien Enemy Act:

> Respecting the power of government, no doubt is entertained. That war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found, is conceded. The mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but cannot impair the right itself. That remains undiminished, and when the sovereign authority shall choose to bring it into operation, the judicial department must give effect to its will. . . .
>
> . . . . . .
>
> . . . war is not an absolute confiscation of this property, but simply confers the right of confiscation.

See also *Ware* v. *Hylton*, 3 Dallas 199, 226-228, 281, and *Fairfax's Devisee* v. *Hunter's Lessee*, 7 Cranch 603, 620.[24] Indeed, Marshall cited the Alien Enemy Act particularly in support of his view that it was not the declaration of war but the Act of Congress which brought into play the absolute and uncontrolled authority which a government possesses over the persons and property of enemies. See *Brown* v. *United States*, *supra* at 126. And his characterization of the power over alien enemies as a right of "confiscation" is wholly consistent with the modern English view that an alien enemy, hostile to the welfare of the country, may properly be described as a prisoner of war and treated as such. *The King* v. *Superintendent of Vine Street Police Station (Ex parte Liebmann)*, 1 L. R. [1916], K. B. D.

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[24] And see Rawle, *View of the Constitution* (1829), p. 87; 1 Kent, *Commentaries* (1826), pp. 56-59; Story, *Commentaries on the Constitution* (1833), sec 1177, see also note in Cooley's edition.

268, 275, 277-8.[25] See also Judge Brackenridge in *Lockington's Case*, Brightly (Pa.) 269, 296.

With this wealth of constitutional authority to draw upon, this Court held, in a case arising out of the first World War, that "Congress was untrammeled and free to authorize the seizure, use or appropriation of [enemy] properties without any compensation to the owners. There is no constitutional prohibition against confiscation of enemy properties." *United States* v. *Chemical Foundation*, 272 U. S. 1, 11. The Trading with the Enemy Act, which sanctioned such confiscation, was upheld as a proper exercise of the constitutional power of Congress "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water." *Stoehr* v. *Wallace*, 255 U. S. 239, 242, quoting Article I, Sec. 8, clause 11 of the Constitution of the United States. See also Mr. Justice Holmes in *Central Trust Co.* v. *Garvan*, 254 U. S. 554, 566. In all of these cases, the Court relied primarily on *Brown* v. *United States*, 8 Cranch. 110, 122, quoted *supra*, pp. 34-35, in which Chief Justice Marshall stated that the power over enemy aliens was not the power over their property alone, but could be applied as well to their persons.

Four different Justices of this Court, in individual opin-

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[25] The English courts have held that under Section 18B of the Defence (General) Regulations, S. R. & O. 1939, No. 927, p. 715, as amended by S. R. & O. 1939, No. 978, and No. 1681, pp. 811, 815; and S. R. & O. 1940, Vol. II, No. 681, p. 24, No. 770, p. 30, and No. 942, p. 58, which confers on the Home Secretary the power to order imprisonment of any person, citizen or alien, believed dangerous to the public safety, the statement of the Home Secretary that he had reasonable cause to believe that the person concerned should be imprisoned, as evidenced by his signature to the imprisonment order, is sufficient answer to a petition for a writ of *habeas corpus*. *Liversidge* v. *Anderson* (1941), 3 All Eng. R. 338 (H. L. 1941). See also *Liversidge* v. *Anderson and Morrison* (1941) 2 All. Eng. R. 612 (C. A. 1941)); *Stuart* v. *Anderson and Morrison* (1941), 2 All Eng. R. 665 (K. B. 1941); *Rex* v. *Home Party, ex parte Greene* (1941), 3 All Eng. R. 104 (C. A. 1941); *Rex* v. *Home Secretary, ex parte Budd* (1941), 2 All Eng. R. 749 (K. B. 1941).

ions or on circuit, have expressly or impliedly upheld the removal provisions of the Alien Enemy Act. See Mr. Justice Washington in *Lockington* v. *Smith*, 15 Fed. Cas. No. 8448; Mr. Justice Iredell in *The Case of Fries*, 9 Fed. Cas. No. 5126 at p. 831; Mr. Justice Story, dissenting in *Brown* v. *United States*, 8 Cranch 110, 153, and Chief Justice Marshall in an unreported case referred to in *Lockington's Case*, Brightly (Pa.) 269, 283, 296. See also Chief Justice Marshall in *Brown* v. *United States*, 8 Cranch 110, 122-123; Kent, C. J., in *Clark* v. *Morey*, 10 Johns. (N. Y.) 69, 71, and the opinion of Attorney General Caleb Cushing, August 31, 1855, 7 Op. Att'y Gen. 453, 454. There has been no dissent from this view.

Although this Court has never had occasion directly to pass on the validity of the Alien Enemy Act it has upheld acts providing for the deportation of friendly aliens. See, *e.g.*, *Fong Yue Ting* v. *United States*, 149 U. S. 698; *United States ex rel. Volpe* v. *Smith*, 289 U. S. 422, 425, and cases cited. There would seem to be no doubt then, as to the right to remove alien enemies, for such a right rests not only on the ordinary power of a sovereign to deport aliens, but also on the war powers of the Government.

In the only case, prior to this war, in which the constitutionality of the Alien Enemy Act has been discussed at length (*De Lacey* v. *United States*, 249 Fed. 625), the Circuit Court of Appeals for the Ninth Circuit sustained the Act as a valid exercise of the war power, under which alien enemies could be summarily restrained or removed. In rejecting the argument that the Act deprives alien enemies of their liberty without due process of law, the court said (249 Fed. at 626) that

> The sections under which these alien enemies were held were originally enacted as the Alien Enemy Act of July 6, 1798, and from that date to this, although

occasion has seldom arisen to enforce the statute, no question has been made of its constitutionality. While, as to property rights and life and liberty, all aliens domiciled in the United States, or temporarily therein, are accorded the equal protection of the law, and due process of law, such is not the case as to alien enemies. "Alien enemies have no rights and no privileges, unless by special favor, during time of war." 2 C. J. 1047. Such was the common law. "Alien enemies have no rights, no privileges, unless by the king's special favor, during time of war." 1 Blackstone, 372. There is nothing in the Constitution or laws of the United States which in any way has changed the common-law rule, or restricted the power of Congress to enact the alien enemy law. Power to enact such a law may at times be essential to the preservation of the government, and the right of all nations to exercise it is recognized in international law.

In *Banning* v. *Penrose*, 255 Fed. 159 (N. D. Ga.), the court noted that the constitutionality of the Act was conceded, and its validity has been upheld or assumed in cases arising out of both this war and World War I.[26]

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[26] World War II: *Citizens' Protective League* v. *Clark*, 155 F. 2d 290 (App. D. C.), certiorari denied, 329 U. S. 787; *United States ex rel Kessler* v. *Watkins*, 163 F. 2d 140 (C. C. A. 2), certiorari denied, No. 414, this Term; *United States ex rel. Ludecke* v. *Watkins*, 163 F. 2d 143 (C. C. A. 2), certiorari denied, No. 147 Misc., this term; *United States ex rel Hack* v. *Clark*, 159 F. 2d 552 (C. C .A. 7); *United States ex rel. Khauer* v. *Jordan*, 158 F. 2d 337 (C. C. A. 7), certiorari denied, 331 U. S. 810; *United States ex rel. Schwarzkopf* v. *Uhl*, 137 F. 2d 898 (C. C. A. 2); *United States ex rel. Schlueter* v. *Watkins*, 158 F. 2d 853 (C. C. A. 2); *Ex parte Ventura*, 44 F. Supp. 520 (W. D. Wash.); *United States ex rel. Zdunic* v. *Uhl*, 137 F. 2d 858 (C. C. A. 2); *United States ex rel. Von Heymann* v. *Watkins*, 159 F. 2d 650 (C. C. A. 2); *United States ex rel. Von Kleczkowski* v. *Watkins*, 71 F. Supp. 429 (S. D. N. Y.); *United States ex rel. D'Esquiva* v. *Uhl*, 137 F. 2d 903 (C. C. A. 2); *United States ex rel. Umecker* v. *McCoy*, 54 F. Supp. 679 (D. N. D.), appeal dismissed, 144 F. 2d 354; *United States ex rel. Gregoire* v. *Watkins*, 164 F. 2d 137 (C. C. A. 2); *Ex parte Gregoire*, 61 F. Supp. 92 (N. D. Cal.); *United States ex rel. DeCicco* v. *Longo*, 46 F. Supp. 169 (D. Conn.); *United States ex rel. Steinvorth* v. *Watkins*, 159 F. 2d 50 (C. C. A. 2); *United States ex rel. Reichel* v.

There would appear to be no doubt then as to the constitutional power of Congress to provide for the removal of alien enemies at the height of a war. Nor is there any substantial doubt as to the continuing Congressional power to accomplish that end so long as there are alien enemies, or, to put it another way, so long as there is a declared war. Indeed when the question now before this Court was raised in one of the earlier aspects of this litigation, the District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia held that no substantial question of constitutionality was raised and, hence, that a hearing before three-judge district court was not required. This Court denied a writ of certiorari to review this decision of the Court of Appeals. *Citizens Protective League* v. *Clark*, 155 F. 2d 290, certiorari denied, 329 U. S. 787. Accord: *United States ex rel. Schlueter* v. *Watkins*, 158 F. 2d 853 (C. C. A. 2); *United States ex rel. Knauer* v. *Jordan*, 158 F. 2d 337 (C. C. A. 7), certiorari denied, 331 U. S. 810; *United States ex rel. Hack* v. *Clark*, 159 F. 2d 552 (C. C. A. 7).

What has already been said with reference to the scope of the Alien Enemy Act itself (see *supra*, pp. 16-32) is virtually dispositive, we think, of the contention that there is no constitutional power to remove German alien enemies after the unconditional surrender of Germany. This Court has only recently had occasion, once again, to reiterate that the war power may survive the termination of actual hos-

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Carusi, 157 F. 2d 732 (C. C. A. 3), certiorari denied, 330 U. S. 842; *In re Territo*, 156 F. 2d 142 (C. C. A. 9).

World War I: *De Lacey* v. *United States*, 249 Fed. 625 (C. C. A. 9); *Grahl* v. *United States*, 261 Fed. 487 (C. C. A. 7); *Ex parte Graber*, 247 Fed. 882 (N. D. Ala.); *Minotto* v. *Bradley*, 252 Fed. 600 (N. D. Ill.) *Ex parte Fronklin*, 253 Fed. 984 (N. D. Miss.); *Ex parte Risse*, 257 Fed. 102 (S. D. N. Y.); *Ex parte Gilroy*, 257 Fed. 110 (S. D. N. Y.); *Hanning* v. *Penrose*, 255 Fed. 159 (D. Ga.); *Halpern* v. *Commanding Officer, etc.*, 248 Fed. 1003 (E. D. N. Y.).

tilities. *Woods* v. *Miller Co.*, No. 486, this Term, decided February 16, 1948. As the Court put it in *In re Yamashita*, 327 U. S. 1, 12, citing *Stewart* v. *Kahn*, 11 Wall. 493, 507: "The war power * * * is not limited to victories in the field, but carries with it the inherent power to guard against the immediate renewal of the conflict, and to remedy, at least in ways Congress has recognized, the evils which the military operations have produced." Indeed in *Commercial Trust Company* v. *Miller*, 262 U. S. 51, 55, 57, this Court sustained a seizure of enemy property as a proper exercise of the war powers even after the cessation of hostilities, the Joint Resolution of Congress declaring the first war with Germany to be at an end, and the Presidential Peace Proclamation.

That power resides in the Congress and in the President to provide for the removal of alien enemies after the unconditional surrender of Germany but while a state of war exists seems clear from these authorities. For the courts to deny that power would be to reject the legislative and executive determination that it is a necessary and appropriate exercise of the war power—a determination which this Court has been extremely loath to make. See cases cited *supra*, pp. 18, 26-27. To hold that the Federal Government cannot provide for the removal of alien enemies because active hostilities have ended would be to reject the political determination, announced at the Inter-American Conference on Problems of War and Peace, held at Mexico City in February and March, 1945, that "The Axis powers, although they realize that they have lost the war, nevertheless hope to win the peace by reconstructing their centers of influence throughout the world, by disseminating their destructive ideology and by creating discontent and discord among the American Republics." [27]

[27] *Report of the Delegation of the United States of America to the Inter-American Conference on Problems of War and Peace* (Department of State

In *Woods* v. *Miller Co., supra*, this Court pointed out that in cases such as that, that case involving rent control, the question whether the war power has been properly employed "is open to judicial inquiry", and that the Congressional judgment on that score "is entitled to the respect granted like legislation enacted pursuant to the police power." Slip opinion, p. 6. While we believe that the Congressional and Executive actions here involved could withstand the light of such a judicial inquiry, we wish to make clear our view that the role of the courts, in this type of case, is a much more limited one.

Bound up as this question of removal of alien enemies is with our foreign policy, and the appropriateness of the Executive action depending as it does on considerations often not of present fact but of international political prognosis, the remarks of this Court with reference to a less delicate aspect of the conduct of our foreign relations have particular force:[28]

> • • • The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports neither are nor ought to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can court sit *in camera* in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions

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Publication 2497. Conference Series 85), Appendix I, p. 71. Among the specific steps recommended by the Conference were (*id.* at 72):

> a) Measures to prevent any person whose deportation has been deemed necessary for reasons of Continental security, from further residing in this Hemisphere, if such residence would be prejudicial to the future security or welfare of the Americas;
>
> b) Measures to prevent the admission to this Hemisphere, now and after the cessation of hostilities, of agents of the Axis powers or their satellites.

[28] *Chicago Airlines* v. *Waterman*, Nos. 78 and 88, this Term, decided February 9, 1948, Slip opinion, pp. 7-8.

as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry. *Coleman* v. *Miller*, 307 U. S. 433, 454; *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 319-321; *Oetjen* v. *Central Leather Co.*, 246 U. S. 297, 302.

Conclusion

The denial, by the courts below, of the petition for a writ of habeas corpus should be affirmed.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.
H. G. MORISON,
Assistant Attorney General.
STANLEY M. SILVERBERG,
Special Assistant to the Attorney General.
SAMUEL D. SLADE,
Attorney.

March, 1948.

APPENDIX A

The Alien Enemy Act of 1798, R. S. 4067-4070, 50 U. S. C. 21-24, provides:[29]

§ 21. Restraint, regulation, and removal.

Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted or threatened against the territory of the United States by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies. The President is authorized in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed, on the part of the United States, toward the aliens who become so liable; the manner and degree of the restraint to which they shall be subject and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to depart therefrom; and to establish any other regulations which are found necessary in the premises and for the public safety (R. S. § 4067; Apr. 16, 1918, ch. 55, 40 Stat. 531).

§ 22. Time allowed to settle affairs and depart.

When an alien who becomes liable as an enemy, in the manner prescribed in section 21 of this title, is not chargeable with actual hostility, or other crime against the public safety, he shall be allowed, for the recovery, disposal, and removal of his goods and effects, and for his departure, the full time which is or shall be stipu-

[29] The section numbers used are those which appear in Title 50 of the United States Code.

lated by any treaty then in force between the United States and the hostile nation or government of which he is a native, citizen, denizen, or subject; and where no such treaty exists, or is in force, the President may ascertain and declare such reasonable time as may be consistent with the public safety, and according to the dictates of humanity and national hospitality (R. S. § 4068).

§ 23. Jurisdiction of United States courts and judges.

After any such proclamation has been made, the several courts of the United States, having criminal jurisdiction, and the several justices and judges of the courts of the United States, are authorized and it shall be their duty, upon complaint against any alien enemy resident and at large within such jurisdiction or district, to the danger of the public peace or safety, and contrary to the tenor or intent of such proclamation, or other regulations which the President may have established, to cause such alien to be duly apprehended and conveyed before such court, judge, or justice; and after a full examination and hearing on such complaint, and sufficient cause appearing, to order such alien to be removed out of the territory of the United States, or to give sureties for his good behavior, or to be otherwise restrained, conformably to the proclamation or regulations established as aforesaid, and to imprison, or otherwise secure such alien, until the order which may be so made shall be performed (R. S. § 4069).

§ 24. Duties of marshals.

When an alien enemy is required by the President, or by order of any court, judge, or justice, to depart and to be removed, it shall be the duty of the marshal of the district in which he shall be apprehended to provide therefor and to execute such order in person, or by his deputy or other discreet person to be employed by him, by causing a removal of such alien out of the territory of the United States; and for such

removal the marshal shall have the warrant of the President, or of the court, judge, or justice ordering the same, as the case may be (R. S. § 4070).

APPENDIX B

Proclamation 2655, issued by President Truman on July 14, 1945, provides (10 Fed. Reg. 8947):

Proclamation 2655

Removal of Alien Enemies by the President of the United States of America

A Proclamation

Whereas section 4067 of the Revised Statutes of the United States (50 U. S. C. 21) provides:

> Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies. The President is authorized, in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed, on the part of the United States, toward the aliens who become so liable; the manner and degree of the restraint to which they shall be subject and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to depart therefrom; and

to establish any other regulations which are found necessary in the premises and for the public safety;

WHEREAS sections 4068, 4069, and 4070 of the Revised Statutes of the United States (50 U. S. C. 22, 23, 24) make further provision relative to alien enemies;

WHEREAS the Congress by joint resolutions approved by the President on December 8 and 11, 1941, and June 5, 1942, declared the existence of a state of war between the United States and the Governments of Japan, Germany, Italy, Bulgaria, Hungary, and Rumania;

WHEREAS by Proclamation No. 2525 of December 7, 1941, Proclamations Nos. 2526 and 2527 of December 8, 1941, Proclamation No. 2533 of December 29, 1941, Proclamation No. 2537 of January 14, 1942, and Proclamation No. 2563 of July 17, 1942, the President prescribed and proclaimed certain regulations governing the conduct of alien enemies; and

WHEREAS I find it necessary in the interest of national defense and public safety to prescribe regulations additional and supplemental to such regulations:

NOW, THEREFORE, I, Harry S. Truman, President of the United States of America, acting under and by virtue of the authority vested in me by the Constitution of the United States and the aforesaid sections of the Revised Statutes of the United States, do hereby prescribe and proclaim the following regulations, additional and supplemental to those prescribed by the aforesaid proclamations:

All alien enemies now or hereafter interned within the continental limits of the United States pursuant to the aforesaid proclamations of the President of the United States who shall be deemed by the Attorney General to be dangerous to the public peace and safety of the United States because they have adhered to the aforesaid enemy governments or to the principles of government thereof shall be subject upon the order of the Attorney General to removal from the United States and may be required to depart therefrom in accordance with such regulations as he may prescribe.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this 14th day of July in the year of our Lord nineteen hundred and forty-five and of the Independence of the United States of America the one hundred and seventieth.

HARRY S. TRUMAN.

By the President:

JAMES F. BYRNES,
Secretary of State.

APPENDIX C

Regulations of the Attorney General (10 Fed. Reg. 12189) pursuant to Presidential Proclamation 2655:

Title 28—Judicial Administration

Chapter I—Department of Justice

Part 30—Travel and Other Conduct of Aliens of Enemy Nationalities

REMOVAL OF ALIEN ENEMIES FROM THE U. S.

Sec.

30.71 Removal from the United States of alien enemies.
30.72 Order of the Attorney General.
30.73 Service of removal order on alien enemy.
30.74 Thirty-day period for voluntary departure.
30.75 Involuntary removal from the United States.

Authority: §§ 30.71 to 30.75, inclusive, issued under R. S. 4067; 50 U. S. C. 21.

§ 30.71 *Removal from the United States of alien enemies.* The Proclamation of the President of the United States, No. 2655 (10 F. R. 8947), dated July 14, 1945, provides in part:

All alien enemies * * * interned within * * * the United States * * * who shall be deemed by the

Attorney General to be dangerous to the public peace and safety of the United States because they have adhered to the aforesaid enemy governments or to the principles of government thereof shall be subject upon the order of the Attorney General to removal from the United States and may be required to depart therefrom in accordance with such regulations as the Attorney General may prescribe.

§ 30.72 *Order of the Attorney General.* When a determination has been made by the Attorney General that an interned alien enemy is deemed to be dangerous to the public peace and safety of the United States because he has adhered to an enemy government or to the principle of government thereof, an order will be signed by the Attorney General directing that the said alien enemy depart from the United States within thirty (30) days after notification of the order and that, if he fails or neglects so to depart, the Commissioner of Immigration and Naturalization is to provide for the alien enemy's removal to the territory of the country of which he is a native, citizen, denizen or subject.

§ 30.73 *Service of removal order on alien enemy.* A copy of the Attorney General's order of removal will be delivered to the alien enemy at the place where he is interned.

§ 30.74 *Thirty-day period for voluntary departure.* An alien enemy who is the subject of a removal order shall have thirty (30) days after receiving notification of the removal order to depart from the United States. Unless the public safety otherwise requires, the Commissioner of Immigration and Naturalization is authorized to release such alien enemy from internment under appropriate parole safeguards in order that the alien enemy may settle his personal and business affairs, provide for the recovery, disposal, and removal of his goods and effects, and make arrangements to depart from the United States.

§ 30.75 *Involuntary removal from the United States.* In the event that an alien enemy, who is the subject of a removal order, fails or neglects to depart from the United States within the above-mentioned thirty-day period, the Commissioner of Immigration and Naturalization will take the alien enemy into custody and will provide for his removal to the territory of the country of which he is a native, citizen, denizen or subject, as soon as transportation is available.

Approved: September 26, 1945.

TOM C. CLARK,
Attorney General.

(F. R. Doc. 45-18005; Filed Sept. 27, 1945; 10:11 a. m.)

APPENDIX D

Name	Date of Removal Order
Paul Ahrens	1-15-46
Max Armbruster	6- 8-46
Willi Backofeh	1-11-46
Paul Bante	1-12-46
Maria Bertelmann (Released 2-6-48)	1-12-46
Else Brinck (Brink)	1-15-46
Walter Brink	1-15-46
Karl J. Boehm	1-18-46
Max Blank	12-13-45
Otto Braunger	1-25-46
Albert Brueckner	1-11-46
Alreich Cappelmann	5-27-46
Ernst E. Christoph	1-11-46
Hans Diebel	4- 3-46
Hans Doelle	1-18-46
Johann R. Enders	1-15-46
Walter Engelbert	1-11-46
Wilhelm Engelbert	12-12-45 (Without hrg) 4- 3-46 (With hrg)
Anna Faller	1-15-46
Xaver Faller	1-15-46
Richard Felis	1-12-46

Name	Date of Removal Order
Walter Feltz	1-11-46
John C. Fitting	1-15-46
Kurt Fries	1-18-46
Luise Fritsch	10-18-46
Rudolf Funk	2- 5-46
(Released 11-28-47)	
Paul Geis	4- 2-46
Adolf Goelzer	1-15-46
Otto Grimm	1-12-46
Georg Grytzyk	1-18-46
Rudolf Gudert	1-15-46
Wilhelm Hack	2-27-46
Helene Hackenberg	1-18-46
Rudolf Hackenberg	1-18-46
Robert Hartmann	1-15-46
Albert Haug	1-29-46
Erna Haupt	2-25-46
Heinz Heinzen	1-18-46
Werner Hofling	1-18-46
(Released 11-28-47)	
Hedwig Hohmann	1-15-46
Martin Hohmann	1-15-46
Paul Hohmann	1-15-46
Hermann Hoehn	1-12-46
Kurt Holz	10-16-45 (Without hrg)
	1-25-46 (With hrg)
Andreas Heinrich Jans	1-15-46
Hans Juhl	1-11-46
Johannes L. Jung	1-12-46
Wolfgang T. Jung	3- 4-46
(Released 11-28-47)	
Wilhelm Kaecher	1-15-46
Joseph Kaiser	10-16-45
(Released 11-28-47)	
Maria Kerling	1-18-46
(Released 11-28-47)	
Julius Kessler	1-18-46
Hans Kippenberg	1-19-46
August Klapproth	3-27-46
Josef Klein	6-25-46
George B. Knaepper	1-11-46
Paul Knauer	9- 4-46
Wilhelm Knaup	1-12-46
Fritz Koehler	1-11-46
Hermann Koetter	1-19-46
Mathias Kohler	1-15-46
Hans L. Kohpeiss	1-14-46

Name	Date of Removal Order
Albert Kolb	1-11-46
Bruno Koop, Jr.	1-14-46
Bruno Koop, Sr.	1-14-46
Alfred Krakau	2- 5-46 (Without hrg)
	5-14-47 (With hrg)
Heinz Krebs	1-11-46
Joseph Kuehn	3- 6-46
Wilhelm Lachnicht	3-29-46
(Released 11-28-47)	
Ernst Lack	1-18-46
Hans Laudage	1-15-46
Alois Lieb	1-11-46
(Released 1-31-48)	
Gotthilf Ludwig	1-18-46
Wilhelm Mank	1-11-46
Elisabeth Meuser	1-15-46
Waldemar Meuser	1-15-46
Gertrud Neubacher	12-28-45
Otto Neubacher	12-28-45
Georg Neupert	1-14-46
Karl Nuernberger	1-14-46
John Oldin	1-14-46
Martin Ortner	1-18-46
Adolf Pasquay	12-28-45
Hans Poehner	1-11-46
Max Rapp	1-11-46
Rosine Rapp	10-13-42
Erich Raubenheimer	1-11-46
Hartwig Reese	1-12-46
Henry Reese	1-18-46
Kasper Rehle	9-27-45
Maximilian Reichel	4- 4-46
Werner Reimann	3- 6-46
Ludwig Resch	1-31-46
Georg Riemenschneider	10- 9-45
Hermann Roehm	1-14-46
Theodore Kurt Roehner	2- 5-46 (Without hrg)
(Released 11-28-47)	10- 4-46 (With hrg)
Anna Rubischon	4- 2-46
Edwin Rubischon	4- 2-46
Anton Rueble	1-15-46
Gerhard Schacht	4- 4-46
Peter Schau	1-11-46
Wilhelm Schaumann	1-15-46
Martin Schluckwerder	1-18-46
Hans J. Schmidt	1-11-46

Name	Date of Removal Order
Kurt Schmidt	1-15-46
Bernhard Schmolke	1-11-46
Hans Schnoor	1-25-46
Franz Schrader	1- 8-46
Albert Schroeder	1-11-46
Siegfried Schulte	1-12-46
Karl Schweitzer	1-14-46
Kurt Schweitzer	1-14-46
Ernst Schwenk	1-14-46
Hermann Schwinn	3-27-46
Herbert C. Seyfferth	2- 5-46 (Without hrg) 6-12-46 (With hrg)
Gerhard Sprenger	1-15-46
Agnes Stephan	1-18-46
Meta Stoehr	6-27-46
Johann Stoll	1-18-46
Walter Sykora	1-11-46
Karl Ueberschoer	1-29-46
Hugo Unrecht	1-29-46
Otto Wagner	1-14-46
Hans E. Weik*	1-15-46
Hans Wichers	1-15-46
Johann Wichers	1-15-46
Selma Wichers	1-15-46
Maria Willumeit	5-23-46
Paul Zitsmann	1-18-46

*Should read Emma Weik Jans.

U. S. GOVERNMENT PRINTING OFFICE, 1946

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 446

PAUL AHRENS, ET AL.

v.

TOM C. CLARK, ATTORNEY GENERAL OF THE UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

MOTION FOR LEAVE TO FILE SUPPLEMENTAL MEMORANDUM

The Solicitor General, on behalf of the respondent in the above-entitled case, respectfully moves this Court for leave to file the attached Supplemental Memorandum.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 446

PAUL AHRENS, ET AL.

v.

TOM C. CLARK, ATTORNEY GENERAL OF THE UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL MEMORANDUM FOR RESPONDENT

During the oral argument of this case, statements were made on behalf of the respondent calling the Court's attention to the successive suits, some by way of injunction and others by way of habeas corpus, through which the efforts of the Government to execute removal orders have been delayed and frustrated over a period of years.

It may be helpful to the Court in this connection to consider some of the relevant dates, especially in view of the uncertainty as to whether Rule 45(1), discussed in our Memorandum in Opposition to Petitioners' Application for a Stay, is self-executing or contemplates a court order; and also in view of the indisputable proof given by these dates that the processes of the courts are being abused.

July 25, 1945 and August 2, 1945. *Citizens Protective League* vs. *Clark*, filed in U. S. District Court for the District of Columbia, injunction suit. (League and 16 individuals—9 denaturalized). Another injunction suit filed September 21, 1945 (League and 144 individuals). Another injunction suit by Werner Reimann, et al, filed October 5, 1945. (These three suits against the Attorney General were brought in the United States District Court for the District of Columbia, and were later consolidated in the United States Court of Appeals. They were brought months before the Attorney General had issued orders of removal, except as to two individuals. There were 159 individual petitioners, practically all being detained at Ellis Island, New York.)

December 12, 1945. United States District Court dismissed all three injunction suits. (Appeals filed).

May 2, 1946. Protective League cases and Werner Reimann case dismissed by the United States Court of Appeals for the District of Columbia. (155 F. 2d 290).

December 9, 1946. Petition for writ of certiorari by Citizens Protective League denied by Supreme Court. (329 U. S. 787.).

December 10, 1946. Petition for writ of habeas corpus on behalf of Herman Agne and others (including 99 of the petitioners in this case) detained at Ellis Island, New York, filed in the United States District Court for the District of Columbia and dismissed the same day. (Appeal filed).

February 24, 1947. Agne, et al. appeal dismissed by United States Court of Appeals. Successive petitions for stays of mandate, pending application for certiorari, granted, but application never filed.

April 3, 1947. Maria Bertelmann and others (including all the petitioners in the case at bar) filed suit, in the United States District Court for the District of Columbia, against Attorney General for injunction.

July 17, 1947. Paul Ahrens, et al., including many of the complainants in the pending Bertelmann suit, filed petition for habeas corpus in the United States District Court for the District of Columbia, although petitioners detained at Ellis Island, New York.

July 21, 1947. Bertelmann, et al., injunction suit dismissed by the United States District Court, but Ahrens, et al. petition still pending. Appeal filed in Bertelmann, et al. case.

July 23, 1947. Ahrens, et al. petition for habeas corpus denied by United States District Court for the District of Columbia.

July 24, 1947, Notice of appeal filed in *Ahrens* case.

July 24, 1947. United States ex rel. Kessler et al. v. *Watkins*, denial of habeas corpus affirmed by Circuit Court of Appeals for the Second Circuit. (Kessler, a petitioner for habeas corpus in New York, where counsel was appointed by the Court to represent him, also one of the petitioners for habeas corpus in the District of Columbia in the *Ahrens* case). (163 F. 2d 140).

July 24, 1947. U. S. ex rel. Ludecke v. *Watkins* denial of habeas corpus affirmed by C.C.A. 2 (163 F. 2d 143).

October 21, 1947. Ludecke applied to Supreme Court for writ of certiorari.

October 24, 1947. Kessler (also a petitioner in *Ahrens* case) applied to Supreme Court for a writ of certiorari.

October 30, 1947. Ahrens case (including Kessler) dismissed by the United States Court of Appeals for the District of Columbia.

November 19, 1947. Ahrens et al. (including Kessler) applied to Supreme Court for writ of certiorari.

December 8, 1947. Certiorari denied in *Kessler* case from 2nd Circuit.

January 12, 1948. Certiorari denied in *Ludecke* case (332 U. S. 853) (later ordered stayed, No. 147 Misc., and then granted, April 5, 1948.).

January 15, 1948. United States Court of Appeals for the District of Columbia dismissed appeal of Maria Bertelmann, et al. (including all the petitioners in the *Ahrens* case) as frivolous.

February 2, 1948. Supreme Court grants writ of certiorari in habeas corpus petition of Ahrens, et al.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

APRIL 1948.

U. S. GOVERNMENT PRINTING OFFICE, 1948

SUPREME COURT OF THE UNITED STATES

No. 446.—October Term, 1947.

Paul Ahrens, et al., Petitioners, *v.* Tom C. Clark, Attorney General of the United States.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[June 21, 1948.]

Mr. Justice Douglas delivered the opinion of the Court.

The initial question presented in this case is the one we reserved in *Ex parte Endo*, 323 U. S. 283, 305, *viz* whether the presence within the territorial jurisdiction of the District Court of the person detained is prerequisite to filing a petition for a writ of *habeas corpus*.

Petitioners are some 120 Germans who are being held at Ellis Island, New York, for deportation to Germany. Their deportation has been directed under removal orders issued by the Attorney General who has found that each of them is dangerous to the public peace and safety of the United States because he has adhered to a government with which the United States is at war or to the principles thereof. These removal orders were issued under Presidential Proclamation 2655 of July 14, 1945 (10 Fed. Reg. 8947) pursuant to the Alien Enemy Act of 1798, R. S. § 4067, 50 U. S. C. § 21. The orders are challenged by these petitions for writs of *habeas corpus* on several grounds, the principal one being that all of them exceed the statutory authority in that they were issued after actual hostilities with Germany ceased.

The petitions were filed in the District Court for the District of Columbia and alleged that petitioners were confined at Ellis Island, New York, and are "subject to the custody and control" of the Attorney General. Respondent moved to dismiss because, *inter alia*, petitioners

were outside the territorial confines of the District of Columbia. The order of the District Court granting the motion was affirmed by the Court of Appeals.

The statute, 28 U. S. C. § 452, provides:

> "The several justices of the Supreme Court and the several judges of the circuit courts of appeal and of the district courts, within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty. A circuit judge shall have the same power to grant writs of habeas corpus within his circuit, that a district judge has within his district; and the order of the circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had."

The question at the threshold of the case is whether the words "within their respective jurisdictions" limit the district courts to inquiries into the causes of restraints of liberty of those confined or restrained within the territorial jurisdictions of those courts. There are few cases on all fours with the present one, the precise question not having frequently arisen in the lower federal courts. But the general view is that their jurisdiction is so confined. *McGowan* v. *Moody*, 22 App. D. C. 148, 158 *et seq*; *In re Bickley*, 3 Fed. Cas. 332. And see *In re Boles*, 48 F. 75; *Ex parte Gouyet*, 175 F. 230, 233; *United States* v. *Day*, 50 F. 2d 816, 817; *Jones* v. *Biddle*, 131 F. 2d 853, 854; *United States* v. *Schlotfeldt*, 136 F. 2d 935, 940.[1] Cf. *Sanders* v. *Allen*, 100 F. 2d 717; *Tippitt* v. *Wood*, 140 F. 2d 689. That is our view.

We start from the accepted premise that apart from specific exceptions created by Congress the jurisdiction of the district courts is territorial. See *Georgia* v. *Pennsyl-*

[1] But see *Ex parte Fong Yim*, 134 F. 938; *Ex parte Ng Quong Ming*, 135 F. 378.

vania R. Co., 324 U. S. 439, 467–468, and cases cited. It is not sufficient in our view that the jailer or custodian alone be found in the jurisdiction.

Although the writ is directed to the person in whose custody the party is detained, 28 U. S. C. § 455, the statutory scheme contemplates a procedure which may bring the prisoner before the court. For § 458 provides that "The person making the return shall at the same time bring the body of the party before the judge who granted the writ." See *Walker* v. *Johnston*, 312 U. S. 275. It would take compelling reasons to conclude that Congress contemplated the production of prisoners from remote sections, perhaps thousands of miles from the District Court that issued the writ. The opportunities for escape afforded by travel, the cost of transportation, the administrative burden of such an undertaking negate such a purpose. These are matters of policy which counsel us to construe the jurisdictional provision of the statute in the conventional sense, even though in some situations return of the prisoner to the court where he was tried and convicted might seem to offer some advantages.

The history of the statute supports this view. It came into the law as the Act of February 5, 1867, 14 Stat. 385. And see Act of August 23, 1842, 5 Stat. 539. Prior to that date it was the accepted view that a prisoner must be within the territorial jurisdiction of the District Court in order to obtain from it a writ of *habeas corpus*. See *Ex parte Graham*, 4 Wash. C. C. 211;[2] *In re Bickley*,

[2] The principle which governed the decision was stated by Mr. Justice Washington as follows, 4 Wash. C. C. pp. 211–212:

"It is admitted that these courts, in the exercise of their common law and equity jurisdiction, have no authority, generally, to issue process into another district, except in cases where such authority has been specially bestowed by some law of the United States. The absence of such a power would seem necessarily to result from the

3 Fed. Cas. 332. Cf. *United States* v. *Davis*, 5 Cranch C. C. 622. The bill as introduced in the Senate was thought to contain an infirmity. The objection was made on the floor that it would permit "a district judge in Florida to bring before him some men convicted and sentenced and held under imprisonment in the State of Vermont or in any of the further States." Cong. Globe, 39th Cong., 2d Sess. 730. As a result of that objection Senator Trumbull, who had charge of the bill, offered an amendment which added the words "within their respective jurisdictions." *Ibid.* at 790. That amendment was adopted as a satisfactory solution of the imagined difficulty.[3] *Id.* Thus the view that the jurisdiction of the District Court to issue the writ in cases such as this[4]

organization of the court of the United States, by which two courts are allotted to each of the districts into which the United States are divided, the one denominated a district, and the other a circuit court. This division and appointment of particular courts for each district, necessarily confines the jurisdiction of these local tribunals within the limits of the respective districts within which they are directed to be holden. Were it otherwise, and the court of one district could send compulsory process into any other, so as to draw to itself a jurisdiction over persons and things without the limits of its district, there would result a clashing of jurisdiction between the different courts not easily to be adjusted, and an oppression upon suitors too intolerable to be endured."

[3] The statute then read, "That the several courts of the United States, and the several justices and judges of such courts, within their respective jurisdictions, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States; . . ." 14 Stat. 385.

[4] We need not determine the question of what process, if any, a person confined in an area not subject to the jurisdiction of any district court may employ to assert federal rights. Cf. *Ex parte Betz; Ex parte Durant; Ex parte Wills; Ex parte Cutino; Ex parte Walczak; Ex parte McKinley;* and *Ex parte Murphy*, 329 U. S. 672.

is restricted to those petitioners who are confined or detained within the territorial jurisdiction of the court is supported by the language of the statute, by considerations of policy, and by the legislative history of the enactment. We therefore do not feel free to weigh the policy considerations which are advanced for giving district courts discretion in cases like this. If that concept is to be imported into this statute, Congress must do so.

Respondent is willing to waive the point, so that we may make a decision on the merits. But the restriction is one which Congress has placed on the power of the District Court to act. Hence it may not be waived by the parties. *United States* v. *Griffin*, 303 U. S. 226, 229.

Ex parte Endo, supra, p. 305, is not opposed to this view. In that case petitioner at the time suit was instituted was within the territorial jurisdiction of the *habeas corpus* court but had subsequently been removed to a different district and circuit. We held, in conformity with the policy underlying Rule 45 (1) of the Court, that jurisdiction of the District Court was not defeated in that manner, no matter how proper the motive behind the removal. We decided that in that situation the court can act as long as it can reach a person who has custody of the petitioner.

Since there is a defect in the jurisdiction of the District Court which remains uncured, we do not reach the question whether the Attorney General is the proper respondent (see §§ 455 and 458; *Wales* v. *Whitney*, 114 U. S. 564, 574; *Jones* v. *Biddle, supra*; *Sanders* v. *Bennett*, 148 F. 2d 19) and, if not, whether the objection may be waived, as respondent is willing to do. Cf. *Ex parte Endo, supra*, pp. 305–307.

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 446.—October Term, 1947.

Paul Ahrens, et al., Petitioners, *v.* Tom C. Clark, Attorney General of the United States.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[June 21, 1948.]

Mr. Justice Rutledge, with whom Mr. Justice Black and Mr. Justice Murphy join, dissenting.

The jurisdictional turn this case has taken gives it importance far beyond the serious questions tendered on the merits of petitioners' application. They are alien enemies interned during the war as dangerous to the nation's safety. They now seek to avoid deportation from a country which takes care for personal liberties, even when its hospitality may be abused, to one which denied its own citizens such rights until its structure of tyranny fell in ruins. Whether or not petitioners have forfeited the right to continued enjoyment of our institutions and the life they foster, and whether the forfeiture has been declared and can now be executed pursuant to lawfully granted authority, are indeed important questions, upon which these petitioners are as much entitled to hearing and decision as Ludecke. Cf. *Ludecke v. Watkins*, No. 723, decided today.

But the Court, putting them aside for these petitioners, cuts much more sweepingly at the roots of individual freedom by its decision upon the jurisdictional issue than could any disposition of those issues. The decision attenuates the personal security of every citizen. So does any serious contraction in the availability of the writ of *habeas corpus*. For the first time this Court puts a narrow

and rigid territorial limitation upon issuance of the writ by the inferior federal courts. Heretofore such constrictive formulations have been avoided generally, even assiduously, out of regard for the writ's great office in the vindication of personal liberty. See, *e. g.*, *Bowen* v. *Johnston*, 306 U. S. 19, 26–28; *Ex parte Endo*, 323 U. S. 283, 304–307; *Price* v. *Johnston*, 334 U. S. —; *Wade* v. *Mayo*, 334 U. S. —.[1]

But today's ruling, departing from that policy, is that the writ can issue only when the place of confinement lies within the limits of the court's territorial jurisdiction. That purely geographic fact and it alone determines the court's competence to act. And this is not merely as a matter of venue or of accommodation in the exercise of authority among tribunals of coordinate power, allowing room for some adaptability to varying circumstances. It is one crucial between competence to act and total impotence. All other considerations are put to one side. Neither the jailer's presence and amenability to process nor his ability or even his willingness to produce the body can cure the court's basic infirmity, if by accident or choice the locus of confinement happens to fall beyond the physical line.

If this is or is to become the law, the full ramifications of the decision are difficult to foresee. It would seem that a great contraction of the writ's classic scope and exposition has taken place,[2] and much of its historic efficacy may have been destroyed. For if absence of the body from the jurisdiction is alone conclusive against existence of power to issue the writ, what of the case where the place of imprisonment, whether by private or public action, is unknown? What also of the situation where that place is located in one district, but the jailer is present in and can be served with process only in

[1] Cf. *Sunal* v. *Large*, 332 U. S. 174, dissenting opinions at 184, 187.

[2] See text *infra* at note 5.

another?[3] And if the place of detention lies wholly outside the territorial limits of any federal jurisdiction, although the person or persons exercising restraint are clearly within reach of such authority, is there to be no remedy, even though it is American citizens who are wrongfully deprived of their liberty and Americans answerable to no other power who deprive them of it, whether purporting to act officially or otherwise? In all these cases may the jailers stand in defiance of federal judicial power, and plead either the accident of the locus of detention outside the court's territorial limitations, or their own astuteness in so selecting the place, to nullify judicial competence?

To none of these questions does the Court give answer, although it purports to reserve decision concerning one of them. Yet in all, if power to act rests solely on the body's presence, its absence[4] will render the court impotent even though the jailer is within grasp of its process for compelling production and, it may be, beyond reach of the like process of any other court. For upon the test prescribed, there must be conjunction of the body's presence and the jailer's for the writ to issue. On the other hand, if relief can be given in such cases, where the conjunction does not exist, then it is not true that the federal courts have been stripped of power to afford it only when the body is held within the limits of their territorial jurisdictions, and the Court's grounding of this decision would seem neither necessary nor proper for disposition of the case.

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[3] Congress has not given the District Court power to direct service of the writ to be made outside the limits of the state in which the court sits, see *United States ex rel. Corsetti* v. *Commanding Officer of Camp Upton*, 3 F. R. D. 360, and it is at least questionable whether service on the turnkey would constitute service on the custodian. See *United States ex rel. Goodman* v. *Roberts*, 152 F. 2d 841.

[4] Further questions necessarily arise concerning matters of pleading and proof of presence necessary to establish the jurisdiction.

By thus elevating the place of physical custody to the level of exclusive jurisdictional criterion, the Court gives controlling effect to a factor which generally has been regarded as of little or no importance for jurisdictional purposes or for the functioning of the writ in its great office as historically conceived. Perhaps the classic exposition of its nature and availability, as also of the character of the proceeding, is that of Judge Cooley, quoted in part with approval by our opinion in *Ex parte Endo, supra*:

> "The important fact to be observed in regard to the mode of procedure upon this writ is, that it is directed to, and served upon, not the person confined, but his jailer. It does not reach the former except through the latter. The officer or person who serves it does not unbar the prison doors, and set the prisoner free, but the court relieves him by compelling the oppressor to release his constraint. The whole force of the writ is spent upon the respondent . . . . The place of confinement is therefore not important to the relief, if the guilty party is within reach of process, so that by the power of the court he can be compelled to release his grasp. The difficulty of affording redress is not increased by the confinement being beyond the limits of the state, except as greater distance may affect it. The important question is, where is the power of control exercised?" [5]

[5] *In the Matter of Samuel W. Jackson*, 15 Mich. 417, 439–440. See *Ex parte Endo*, 323 U. S. at 306. At a later point Judge Cooley's opinion continued: "There is no inherent difficulty in the case; and the court of chancery, in the exercise of its power to compel specific performance, frequently exerts an authority over a subject matter in a foreign jurisdiction similar to that which is sought for here. I think the case presented by the petition is one in which we can give relief, and the decision in *United States v. Davis*, 5 *Cranch, C. C.* 622, is in point, and will warrant it. *There are no conflicting decisions. The*

In this historic view the proceeding in *habeas corpus* is analogous jurisdictionally neither to one *in rem* or *quasi in rem* nor to the anomalously restricted personal action, as developed in the common law, of trespass to realty.[6] Yet the Court's decision gives to this prime remedy for invasion of personal liberty an availability in the inferior federal courts hardly greater than those highly restricted proceedings possess, jurisdictionally speaking, for purposes remedial of injuries to property. Those courts indeed are deprived of powers in *habeas corpus* which, as Judge Cooley pointed out in relation to state tribunals,[7] they may constantly exert with extraterritorial effects in the exercise of their general jurisdiction in equity.

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incidental remarks which have been made in some cases about the remedy applying where the imprisonment is within the state, seem to me of no significance. In none of those cases was attention directed to this particular point . . ." (Emphasis added.) P. 441.

Some of the cases following this view are *Emerson* v. *Guthner*, 107 Colo. 83; *Crowell* v. *Crowell*, 190 Ga. 501; *Shaw* v. *Shaw*, 114 S. Car. 300; *Queen* v. *Barnardo*, 24 Q. B. D. 283; *In re Matthews*, 12 I. R. C. L. 233; and see cases cited in *Ex parte Endo*, 323 U. S. at 306. The same position is taken in Church, Habeas Corpus (2d ed.) § 109.

In the *Endo* case, although reserving the precise issue now decided, we said: "There are expressions in some of the cases which indicate that the place of confinement must be within the court's territorial jurisdiction in order to enable it to issue the writ. See [cases cited in note 16 *infra*]. But we are of the view that the court may act if there is a respondent within reach of its process who has custody of the petitioner. As Judge Cooley stated in *In the Matter of Samuel W. Jackson*, 15 Mich. 417, 439–440:". Then followed the matter quoted in the text ending with the words, "The whole force of the writ is spent upon the respondent;" together with citation of other authorities to similar effect. 323 U. S. 283, 306.

[6] See Restatement, Conflict of Laws, § 624 Special Note (Tent. Draft No. 5, 1929); see also Proposed Final Draft No. 2, Question Suggested for Discussion, § 624; Note, 28 Ky. L. J. 462.

[7] See note 5.

This exaltation of the territorial element in jurisdiction, with such constrictive and potentially destructive consequences, the Court makes by reason of its conception of the meaning of the statutory phrase, "within their respective jurisdictions," 28 U. S. C. 452; the legislative history of its insertion; and certain considerations of policy, relating especially to the production of persons detained by federal penal or other authorities in courts distant from the places of detention and thought to require the narrow reading given. I do not think these considerations compel so rigid a jurisdictional significance, or that this is necessary to avoid the evils the Court thus seeks to escape.

The jurisdictional problem as presented by the facts involves two questions. The first, the Court does not reach. But it is one I think basic to consideration of the other, a difference no doubt due to different emphasis upon the territorial element in jurisdictional matters of this sort. The question is whether the Attorney General is a proper party respondent. The answer turns on whether the petitioners are in his custody[8] and thus are subject to his power of production. In my opinion they are.

The same principle which forbids formulation of rigid jurisdictional limitations upon the use of this prerogative writ in other respects, inconsistent with its availability for performing its office in varying circumstances, forbids limiting those who may be called upon to answer for restraints they unlawfully impose by technical niceties of the law of principal and agent, superior or subordinate in public authority, or immediacy or remoteness of the incidence of the authority or power to restrain. Juris-

[8] The statute provides that the "writ shall be directed to the person in whose custody the party is detained." Rev. Stat. § 755, 28 U. S. C. § 455.

dictionally speaking, it is, or should be, enough that the respondent named has the power or ability to produce the body when so directed by the court pursuant to process lawfully issued and served upon him.[9]

There can be no question of the Attorney General's power to produce the petitioners in this case. For he is in complete charge of the proceedings leading up to the order directing their removal from the country;[10] indeed he claims to have complete discretion to decide whether or not removal shall be directed. In view of his all-pervasive control over their fortunes, it cannot be doubted that he is a proper party to resist "an inquiry into the cause of restraint of liberty" in their cases.[11]

Moreover, there can be no doubt of the Attorney General's amenability, in his official capacity, to process in the District of Columbia searching his official acts for lawful authority,[12] nor does he claim immunity in this respect.

The case therefore is one in which every requisite of jurisdiction, as the writ has been conceived historically,

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[9] See cases cited in notes 5 and 17.

[10] The Executive Proclamation under which the Attorney General was acting provides that all alien enemies "who shall be deemed by the Attorney General to be dangerous to the public peace and safety of the United States because they have adhered to the aforesaid enemy governments or to the principles of government thereof shall be subject upon the order of the Attorney General to removal from the United States and may be required to depart therefrom in accordance with such regulations as he may prescribe." Proclamation 2655, 10 Fed. Reg. 8947. This proclamation was issued pursuant to the authority conferred by the Alien Enemy Act of 1798, 1 Stat. 577.

[11] Furthermore, as the Solicitor General points out in his brief, there is "no reason why the United States cannot waive this particular objection since it has the effect merely of permitting suit against one Government officer rather than another."

[12] See Fed. Rules Civ. Proc., 28 U. S. C. following § 723 c, Rule 4 (f).

is present. The person having custody of the body has not only the ability but the authority to produce it. He is within reach of the court's process and amenable to it for that purpose. Indeed in this case he is willing to respond and, to that end, to waive any objection he might be entitled to make to the court's exercise of its power.[13] Unless therefore power is totally wanting by reason of petitioners' absence from the district, there is no insuperable obstacle to its exercise in this case. And as to this the Attorney General does not urge, he merely suggests, in view of certain dicta and decisions, see note 18, that the power may be lacking for that reason.

If so, this can be only because the statutory wording, "within their respective jurisdictions," compels the Court's conclusion.[14] The language, however, does not even pur-

[13] Upon the facts the situation is one in which the Government quite properly desires a speedy determination upon the merits, in order to avoid the further delay necessarily incident to reaching them by further proceedings. Whether from the viewpoint of establishing the Government's power to remove the petitioners or of terminating the restraint upon their liberties, expedition of the determination is highly desirable.

[14] The 1925 amendment to the statute providing that "the order of the circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had" does not limit jurisdiction to grant the writ. See *Ex parte Endo*, 323 U. S. 283, 307, n. 26. The provision is a mere recording requirement applicable in terms only to circuit judges acting individually. Appropriately it does not apply to courts as distinguished from judges because court orders would be recorded by routine procedure, whereas an order issued by a judge in vacation would require special treatment. Since the application in this case was made to a court in session, the requirement does not apply here. But even if it did apply, and even if a recording provision enacted in 1925 could be taken to relate back to the amendment of 1867 to give meaning to the words "within their respective jurisdictions," the wording "the district wherein the restraint complained of is had" could be taken as readily to mean "wherein the power of control is exercised" as "wherein the body is located." Cf. the cases cited in notes 5 and 17.

port to define "their respective jurisdictions" in terms of where the body restrained is held. Indeed, it gives no indication that absence of the persons detained from the district which has personal jurisdiction of their custodian creates an insuperable jurisdictional defect, with the necessary consequence that if he is beyond reach of process issued by the courts where the body is held there can be no remedy by *habeas corpus* in any federal court. On the contrary, the wording of the statutory phrase is as consistent with regarding "their respective jurisdictions" as attaching when the court acquires jurisdiction over the jailer by service of process within the limits of its territorial jurisdiction, even though the place of detention is elsewhere, as it is to invert those factors of territorial limitation in the manner of the Court's construction.

It is true that Congress, when it added the phrase, was concerned with the problem, or rather the possibility, that the inferior federal courts might abuse their power, in issuing the writ, by requiring the production of persons detained in distant places, with the effect of maladjustment in the exercise of authority as among the different federal courts. But it does not follow, as the Court concludes, that it sought to solve those problems in a manner that would deprive all courts of power to issue the writ except those sitting in the place of detention. As will appear, Congress was dealing with an even broader possibility for abuse, and while it sought to limit authority to issue the writ, there is nothing in the statutory language, the legislative history, or the problem of statutory authorization the amendment was introduced to solve, which shows that so narrow and rigid a restriction was contemplated.

To put the matter in proper perspective, before turning to the legislative history and the precise problem with which it was concerned, it is important to emphasize that the alternative to the Court's holding is not that peti-

tioners have a right to be heard in a distant court whenever the Attorney General may there be served. Rather the alternative is that their absence from the district is a circumstance which normally would induce the court to exercise its discretion to decline jurisdiction, but which may be disregarded in exceptional circumstances if the respondent so desires or if the court finds that justice in the particular circumstances so demands.

Even though we start from the accepted premise that for this purpose the jurisdiction of the district court is territorial, see *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439, 467–468, we should also recall, as has already been stated, that the Attorney General is within the territorial jurisdiction of the court in which these proceedings were instituted. It is within his power to terminate the restraint of petitioners' liberty without leaving the District of Columbia. In the sense stated by Judge Cooley, his power of control is exercised within that District. We have no problem of issuing process to be served outside the District of Columbia such as might result in "a clashing of jurisdiction between the different courts not easily to be adjusted, and an oppression upon suitors too intolerable to be endured," and with which alone in my opinion the statutory phrase sought to deal.[15]

When the cases where both the custodian and his prisoner are outside the territorial jurisdiction of the court [16] are separated from those where the custodian is within

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[15] See *Ex parte Graham*, 4 Wash. C. C. 211, 212. See note 2 of the Court's opinion. In that case, as in most of the cases cited by the Court, the custodian and the prisoner were both outside the territorial jurisdiction of the court. See notes 16, 17 and 18.

[16] *Ex parte Graham*, 4 Wash. C. C. 211; *In re Boles*, 48 F. 75; *Ex parte Gouyet*, 175 F. 230; *Ex parte Yee Hick Ho*, 33 F. 2d 360; *United States* v. *Day*, 50 F. 2d 816 (in this case the custodian did appear in court, but only specially to challenge its jurisdiction); *Jones* v. *Biddle*, 131 F. 2d 853; *United States* v. *Schlotfeldt*, 136 F. 2d 935.

the jurisdiction though the prisoner is elsewhere,[17] the weight of authority in the lower federal courts is opposed to the conclusion reached today.[18] With the former class this case is not concerned. But, for reasons yet to be stated, it is with that class alone, in my opinion, that the phrase "within their respective jurisdictions" sought to deal. Moreover, other authorities have generally taken the position that jurisdiction over the custodian is sufficient regardless of the location of the party restrained.[19] In the light of this prevailing conception of the problem, we turn to the Court's reasons for departing from it.

Principal reliance is placed on the legislative history of the 1867 amendment. But this history neither requires nor, in my opinion, justifies the Court's view. It consists in a short statement by Senator Johnson, followed by brief colloquy, which led to insertion of the phrase.

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[17] *United States* v. *Davis*, 5 Cranch C. C. 622; *In re Bickley*, 3 Fed. Cas. 332, No. 1,387; *McGowan* v. *Moody*, 22 App. D. C. 148; *Ex parte Fong Yim*, 134 F. 938; *Ex parte Ng Quong Ming*, 135 F. 378; *Sanders* v. *Allen*, 100 F. 2d 717. See *Tippitt* v. *Wood*, 140 F. 2d 689; *Burns* v. *Welch*, 159 F. 2d 29.

[18] Of the cases cited in note 17 only *McGowan* v. *Moody* and *In re Bickley* are in accord with today's decision. And even those two cases are distinguishable. In *McGowan* v. *Moody* the principal ground of decision seems to have been that the prisoner was not in the actual custody of the Secretary of the Navy. See 22 App. D. C. at 163–164. Moreover, the authority of that case is questionable in view of later decisions by the same court, see note 24 *infra*. Although *In re Bickley* does rest on the ground that the court was not "competent to give the relief asked for" and uses the term "jurisdiction," it is well known that at that time the term "jurisdiction" was often used in the sense of "venue," and since the custodian did not waive the defect it was not necessary for the court to reach the precise issue adjudicated today. In fact the opinion intimates that the result would have been different if the point had been "freely conceded." See pp. 333–334.

[19] See note 5.

Cong. Globe, 39th Cong., 2d Sess. 730, 790, 890. It seems quite clear that he was concerned about a wholly different problem, arising from the bill's broad wording before the limiting phrase was introduced.[20] This was the possibility that the bill would confer power upon district judges to issue process against jailers in remote districts, and thus create departure from the usual rule, in *habeas corpus* cases as in others, that process does not run beyond the territorial jurisdiction of the issuing court. The Senator wished to make sure that the bill would not have that effect. And the underlying assumption of the entire discussion was that, without the limitation proposed, the bill's unlimited language might be taken to give authority to district courts to issue process to run throughout the country, comparable as was said to that exercised by justices of this Court, or even beyond its borders,[21] and thus to bring before them jailers without regard to distance.

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[20] The bill, prior to addition of the phrase, read pertinently as follows: "*Be it enacted, &c.*, That the several courts of the United States and the several justices and judges of such courts, in addition to the authority already conferred by law, shall have power to grant writs of *habeas corpus* in all cases where any person may be restrained of his or her liberty in violation of the Constitution or of any treaty or law of the United States . . . ." Cong. Globe, 39th Cong., 2d Sess. 730.

[21] When the amendment "within their respective jurisdictions" was suggested, Senator Johnson commented on it as follows: "The amendment proposed by the honorable chairman is entirely satisfactory to me. I suggested the necessity of an amendment the other day because I know that the late Chief Justice of the United States decided that under the laws as they stand process issued by a judge of the Supreme Court in cases where those judges have a right to issue process extends all over the Union. That I am satisfied might lead to a practical evil. The amendment proposed by the honorable chairman is entirely satisfactory to me and removes that difficulty." Cong. Globe, 39th Cong., 2d Sess. 790.

It was this possibility which led to the proposal and acceptance of the amendment, not that a jailer within the court's jurisdiction, *i. e.*, in reach of its process issued and served within its territorial jurisdiction, might detain the body outside those limits and be required to bring it before the court when ordered. Indeed there is not a word in the legislative discussion about the latter situation, or to suggest that it was the cause either of concern or of the amendment's inclusion. Neither Senator Johnson nor anyone else seems to have had in mind the situation where the locus of detention is in one jurisdiction and the jailer is present in another, amenable to its process.[22] It is this crucial fact which the Court's opinion and ruling ignore.

Confining the running of the court's process to its territorial jurisdiction is of course a very different thing from confining its jurisdiction to cases in which the prisoner's body is located within those limits. Most importantly, it is one much less destructive of the writ's efficacy in cases where it may be most needed, and of the historic conception of the nature and scope of the proceeding. The amendment's terms are completely satisfied, are given their full and intended effect, if they are limited to the former object. So taken, they do no more than prevent the section's otherwise unlimited phrasing from authorizing process to run without territorial limitation, cf. *Georgia* v. *Pennsylvania R. Co.*, *supra* at 467–468, and authorities cited; they do not trench upon the writ's classic availability or its utility as a prime safeguard of freedom. There is no hint in either the amendment's wording or in its legislative history that it had any such

[22] The discussion of the amendment in the Senate was limited to the statements by Senator Johnson, quoted in part in note 21, and the remarks of Senator Trumbull, who introduced the amendment as a result of Senator Johnson's statement. See Cong. Globe, 39th Cong., 2d Sess. 730, 790.

restrictive purpose or effect. The entire measure was adopted in fact, not to reduce, but to expand the writ's availability.[23]

In view of this history and its effect for the statute's meaning and purpose, the considerations of policy and convenience upon which the Court relies to bolster its view can have no proper influence to give that view validity. Indeed, if the legislative history were less clear than it is against the Court's conception, a due and hitherto traditional regard for the writ's high office should dictate resolving any doubt, as between the possible constructions, against a jurisdictional limitation so destructive of the writ's availability and adaptability to all the varying conditions and devices by which liberty may be unlawfully restrained.

Especially is this true since no such rigid restriction is necessary to provide adequate safeguard against the evils the Court envisages. It seems to proceed upon the assumption that if jurisdiction in the District of Columbia were admitted, federal prisoners thousands of miles away would have an unqualified right to invoke it.

On the contrary, if the Attorney General should not waive objection to proceeding in the District of Columbia as he has done here and there were no compelling reason for overriding his objection, such as the absence of any possible remedy elsewhere, the courts of the District clearly would have discretion to decline the exercise of their jurisdiction. Indeed, in the vast majority of such cases, where remedy would be available in a more con-

[23] The Act of 1867 was an important liberalizing measure in two respects. Substantively, the statute authorized the issuance of the writ to relieve any detention in violation of the Constitution or laws of the United States. Procedurally, the remedy was extended to all persons in state as well as in federal custody. See Note, 61 Harv. L. Rev. 657, 659. "[N]o indication has been found of intent to narrow the act . . ." *Ibid.*, n. 22.

venient forum, it would be their duty to do so and an abuse of discretion, subject to correction upon review, for them to compel the petitioner's production in such an inconvenient or otherwise inappropriate forum. See *Beard* v. *Bennett*, 114 F. 2d 578, 580–581.

In this view it would be only the exceptional case of detention outside the District and pursuant to authority independent of its affairs, which would require or indeed permit the exercise of jurisdiction by its courts. On the other hand, in the situations where the District has a peculiar interest that its courts shall have power in such cases, namely, those affecting its penal institutions located outside its borders, they would not be deprived of jurisdiction, as the present decision consistently applied would seem to necessitate.[24]

[24] The District of Columbia Reformatory is located at Lorton, Virginia, and the District Workhouse is at Occoquan, Virginia. Persons are confined in these institutions for violations of the District of Columbia Code. The official in charge of both institutions is a resident of the District and maintains his headquarters in the District. For obvious administrative reasons, the Court of Appeals of the District of Columbia has therefore held that applications for *habeas corpus* may be filed in courts of the District by inmates of those institutions even though they are confined beyond its territorial jurisdiction. *Sanders* v. *Allen*, 100 F. 2d 717. See *Burns* v. *Welch*, 159 F. 2d 29. Under today's ruling such petitions must hereafter be filed in the Virginia federal court to the inconvenience of the parties and of the court, which must to a certain extent apply law peculiar to the District of Columbia.

It is of interest that the Court of Appeals reached this result in the face of the apparently inconsistent earlier holding in *McGowan* v. *Moody*, 22 App. D. C. 148. That case has been explained either on the ground that even though the court had jurisdiction it properly declined to exercise it because relief was available elsewhere, see *Sanders* v. *Allen*, 100 F. 2d 717, 719, but cf. note 25 *infra*, or, at least by implication, on the ground that Secretary Moody was not a proper party respondent. See *Sanders* v. *Bennett*, 148 F. 2d 19, 20, n. 2. Both of these grounds indicate that the Court of Appeals no longer regards *McGowan* v. *Moody* as authority for the proposition for which the Court cites it today.

The Court has reserved decision upon cases where the place of confinement is not within the territorial jurisdiction of any court.[25] And it has sought to distinguish *Ex parte Endo, supra.* I agree that the reservation and the distinction should be made. But I think the fact they have been found necessary goes far to destroy the validity of the present decision's grounding.

Cases of the type reserved have arisen recently on application for original writs of *habeas corpus* by petitioners detained by the military authorities in Germany and Japan. *Ex parte Betz; Ex parte Durant; Ex parte Wills; Ex parte Cutino; Ex parte Walczak; Ex parte McKinley; Ex parte Murphy.* 329 U. S. 672. Some of those petitioners were citizens of the United States; some were civilians, others members of the armed forces. In some instances the detention was pursuant to sentences imposed by military tribunals for alleged offenses, death being the penalty in one. In other cases the petitioners claimed to be confined for indefinite periods without charge and without trial.

The jurisdictional questions raised by those petitions are of profound importance.[26] And if any of the reasons advanced for today's decision is deemed controlling, all such questions will be resolved in the future against such petitioners. Perhaps when those cases arise the Court will ignore the reasons relied on today, just as today it ignores the reasoning relied on in *Ex parte Endo.* For if absence of the body detained from the territorial juris-

[25] The logical inconsistency of this reservation with the decision is highlighted by the citation, apparently with approval, of *McGowan v. Moody,* 22 App. D. C. 148, where the court expressly assumed that if it had no jurisdiction, there would be no tribunal in which relief might be had. P. 158. In that case the petitioner sought relief against the Secretary of the Navy in behalf of a Marine imprisoned on Guam.

[26] See Wolfson, Americans Abroad and Habeas Corpus, 9 F. Bar J. 142.

diction of the court having jurisdiction of the jailer creates a total and irremediable void in the court's capacity to act, what lawyers call jurisdiction in the fundamental sense, then it is hard to see how that gap can be filled by such extraneous considerations as whether there is no other court in the place of detention from which remedy might be had and whether a rule of this Court, Rule 45 (1), can override a basic jurisdictional limitation Congress has imposed.

In any event, I cannot subscribe to the view that Congress has laid down a jurisdictional criterion so capricious in its consequences or so destructive of the writ's historic nature, scope and availability. As was stated at the beginning, the full ramifications of the decision are difficult to foresee. It is one thing to lay down a rule of discretion adequate to prevent flooding the courts of the District of Columbia with applications for *habeas corpus* from the country at large. It is entirely another to tie their hands, and those of all other inferior federal courts, with a strict jurisdictional limitation which can only defeat the writ's efficacy in many cases where it may be most needed.

Not the least important of these may be instances arising in the future where persons are wrongfully detained in places unknown to those who would apply for *habeas corpus* in their behalf. Without knowing the district of confinement, a petitioner would be unable to sustain the burden of establishing jurisdiction in any court in the land. Such a situation might arise from military detention, cf. *Duncan* v. *Kahanamoku*, 327 U. S. 304; *Ex parte Milligan*, 4 Wall. 2; *In the Matter of Samuel Stacy*, 10 Johns. 328; or as a result of mass evacuation of groups from a given area in time of emergency with consequent disruption of the means of keeping personnel records in order, cf. *Hirabayashi* v. *United States*, 320 U. S. 81; *Ex parte Endo*, *supra*; or possibly, though it is to be hoped

not often, even from wilful misconduct by arbitrary executive officials overreaching their constitutional or statutory authority. These dangers may seem unreal in the United States. But the experience of less fortunate countries should serve as a warning against the unwarranted curtailment of the jurisdiction of our courts to protect the liberty of the individual by means of the writ of *habeas corpus*.

Accordingly, I dissent from the conclusion and judgment of the Court. Since I think the District Court had jurisdiction and since also the Attorney General has waived any objection to its exercise in this case, for reasons certainly not inadequate, I am also of the view that the case should be decided on the merits.